TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 178

THE FIDELITY AND DEPOSIT COMPANY OF MARYLAND, PETITIONER,

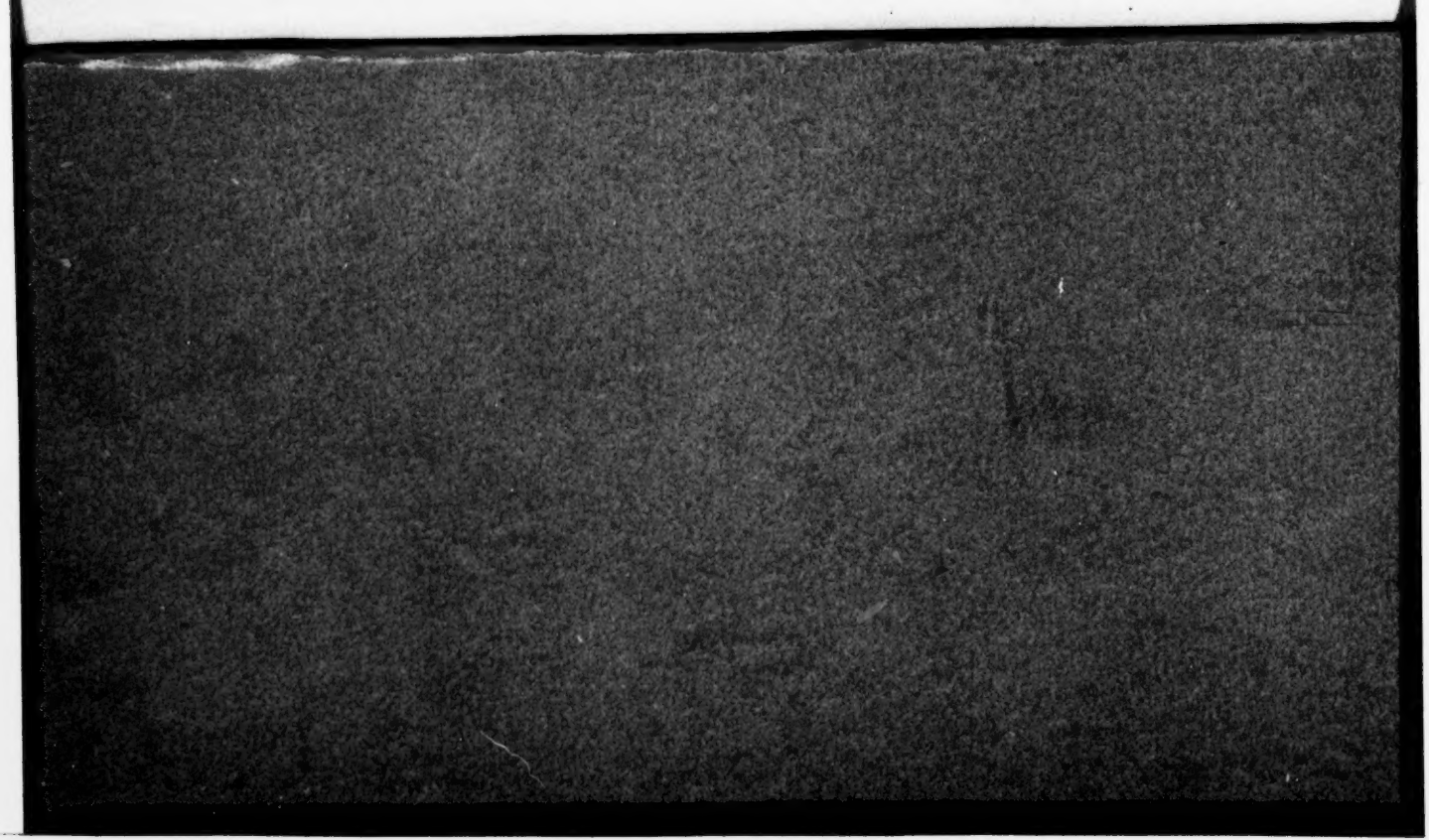
vs.

R. H. COURTNEY, RECEIVER, &c.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

PETITION FOR CERTIORARI FILED OCTOBER 22, 1900.
CERTIORARI AND RETURN FILED NOVEMBER 5, 1900.

(17,939.)



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a Filed Sep. 26, 1899. Frank O. Loveland, Clerk.

United States Circuit Court of Appeals, Sixth Circuit.

THE FIDELITY & DEPOSIT COMPANY OF MARYLAND, Plaintiff in Error,
vs.
R. H. COURTNEY, Receiver of the German National Bank of Louisville, Defendant in Error. } No. 751.

Error to the circuit court of the United States for the district of Kentucky.

Record.

Original transcript filed July 29, 1899.

1 *Transcript of Record.*

Proceedings of the circuit court of the United States for the district of Kentucky, at a regular term begun and held at the Federal Court hall, in the city of Louisville, on Monday, February 20th, A. D. 1899.

Present: Hon. Walter Evans, sitting as circuit judge.

R. H. COURTNEY, Receiver of the German National Bank,
vs.
THE FIDELITY & DEPOSIT COMPANY OF MARYLAND.

Be it remembered, that heretofore, to wit, on the 5th day of February, 1898, came plaintiff herein, R. H. Courtney, receiver, by his attorney, and filed his petition in the above-styled cause, which petition is as follows:

United States Circuit Court for the Sixth District of Kentucky.

R. H. COURTNEY, Receiver of the German National Bank,
vs.
THE FIDELITY & DEPOSIT COMPANY OF MARYLAND.

Plaintiff, R. H. Courtney, states that on the 1st day of June, 1894, the German National Bank of Louisville was a duly incorporated and chartered national bank of the United States, under the laws of the Congress of the United States, known as "the national bank act," and as such authorized to transact a general banking business at Louisville, Kentucky, and to contract and be contracted with, sue and be sued in said name of "the German National Bank of Louisville;" that said banking association so continued until
2 January 18th, 1897, when same was by order of the Comptroller of the Currency of the United States closed—that on January 22nd, 1897, plaintiff, R. H. Courtney, was duly and legally appointed by said comptroller as receiver of said banking association and qualified as such, and is now such receiver and as such

entitled to the assets and choses in action belonging to said German national bank. Plaintiff further states that he, the said R. H. Courtney, is a resident and citizen of the city of Louisville, State and district of Kentucky; plaintiff further states that the defendant, The Fidelity & Deposit Company of Maryland, was then and is now a duly organized and incorporated company for commercial purposes, under and by virtue of the laws of the State of Maryland, and as such was and is authorized to contract and be contracted with, execute bonds of guaranty and indemnity, to sue and be sued and to go surety for the performance of the duties of officers, etc., of national banks and other institutions, and that said corporation by its articles of incorporation and the laws of the State of Kentucky, possesses all of said powers within the State of Kentucky.

Plaintiff, R. H. Courtney, says that the German National Bank of Louisville was on the first day of June, 1894, a duly organized national banking association under the laws of the United States of America—known as the national banking acts—and doing a banking business at Louisville, Kentucky, and authorized to contract and be contracted with, and sue and be sued in said name, "the German National Bank of Louisville," that Jacob M. McKnight was the president thereof, and that on the 1st day of June, 1894, the said Fidelity and Deposit Company executed a bond, No. 5002, to said banking association to hold it harmless by reason of any loss that it might sustain by reason of any fraudulent act or acts of said Jacob M. McKnight, president, during the continuance of the said bond in the performance of the duties of his said office or of such other position as he might subsequently be appointed to or called upon to fill by said bank in said service, not in excess, however, of the penalty of said bond, to wit, $10,000.00—that on the 1st day of June, 1895, said Fidelity and Deposit Company by renewal receipts renewed said bond to said banking association for the term of one year, that is, from June 1st, 1895, to June 1st, 1896, and on the 1st day of June, 1896, said Fidelity and Deposit Co. renewed said bond to said bank by another renewal receipt, from the 1st day of June, 1896, to the 1st day of June, 1897, said bank continued its said business under said charter and said McKnight being still the president;

3 that subsequent to the execution of said bond and during the continuance thereof and the renewals thereof, the said Jacob M. McKnight in the performance of the duties of his said office and of such other position as he was subsequently appointed to and called upon to fill in said service, did feloniously embezzle, abstract and willfully misapply money, securities and other personal property belonging to said association to the amount of $18,742.74, as is more particularly described and set out hereinafter, in the itemized account herein included as part hereof; that by reason thereof said German national bank has sustained pecuniary loss to the amount of $18,742.74, that said acts of Jacob M. McKnight and each of them, in embezzling abstracting and misapplying said money, securities and personal property of said bank as aforesaid, were and are all dishonest and fraudulent acts; that said bank has at all times complied with the conditions of said bond that it was

required to do by the terms thereof, and that no part of said loss has been made good to said bank, and said bank holds no further bond or guarantee of surety for said loss; that on the 18th day of January, 1897, said German national bank was closed by order of the Comptroller of the Currency and the employment of said McKnight ceased and on the 22nd day of January, 1897, said affiant, R. H. Courtney, was duly and regularly appointed by the Comptroller of the Currency of the United States as receiver of said bank and qualified as such, and is now such receiver and entitled as such to recover the said amount of $10,000 under said bond of said Fidelity and Deposit Company, said renewal receipts are herewith filed as part hereof, marked "A" & "B."

Said itemized statement being as follows:

July 11th, 1894.—To amount collected by Jacob M. McKnight, president of the German national bank, of the funds of said bank, from the Columbia Finance — Trust Company, agents of Attilla Cox, assignee of J. G. Mattingly & Sons, on a claim owing by said J. G. Mattingly & Sons, to said bank, which amount was collected by said Jacob M. McKnight as aforesaid, who willfully misapplied same to his own use and benefit and never accounted to the bank therefor.

Amount..... ..... $252.09

January 21st, 1896.—To amount paid by German national bank on check of S. E. Edmunds, dated January 18th, 1896, on the said German national bank, payable to cash or bearer, for $1,000.00;
4 said check having been drawn by said Edmunds on said bank and presented to the said McKnight as president, for payment, and which said check the said McKnight did on the said 21st day of January, 1896, pay and cause to be paid out of the funds of said bank to the said S. E. Edmunds, when the said McKnight then and there knew that the said Edmunds had no funds in said bank against which he was entitled to make checks—and the said McKnight did then and there pay and cause to be paid said check, for the fraudulent purpose of willfully misapplying said amount for the use and benefit of himself and the said Edmunds and other persons unknown, and to defraud said bank of same.

Amount..... $1,000.00

January 21st, 1896.—To amount paid and caused to be paid to M. A., D. A., and J. G. Sachs by Jacob H. McKnight, president of the German national bank, on check of the said McKnight on said bank for $1,253.00, said McKnight knowing at the time that he had no funds in the bank against which — was entitled to check, did fraudulently and willfully misapply the funds of said bank, in payment of said check as aforesaid and apply same to his own use and benefit.

Amount..... $1,253.00

February 6th, 1896.—To amount paid F. A. Britt and J. W. Reeder on note executed by them, dated February 6th, 1896, due

in one year, for $2,000.00, payable to the order of themselves and endorsed by them on the back thereof, said note being made payable to the German national bank; that the said Jacob M. McKnight, president aforesaid, at the time of the pretended discounting of said note well knew that the said F. A. Britt and J. W. Reeder were both insolvent and that the said paper was worthless, but that he did then and there so receive same and pay them therefor the sum of two thousand dollars ($2,000.00) of the funds of the said bank, for the fraudulent purpose of willfully misapplying said amount to his own use and benefit and that of F. A. Britt and J. W. Reeder and of defrauding said bank of said money, without the knowledge or consent of directors or exchange and discount committee.

Amount..... $2,000.00

February or March, 1896.—To amount paid M. A., D. A., and J. G. Sachs, on check of J. M. McKnght on the German national bank for $1,650.00, said payment being made and caused to be made by the said J. M. McKnight, president, out of the funds of said bank, for the fraudulent purpose of willfully misapplying said funds to his own use and benefit and that of the said Sachs—said Jacob M. McKnight knowing at the time that he had no funds in said bank against which he was entitled to check or out of which said check could be paid.

Amount..... $1,650.00

June 8th, 1896.—To payment of check of J. M. McKnight on the German national bank to the Union national bank for $3,736.60, out of the funds of the said German national bank, said J. M. McKnight knowing at the time he paid said check and caused the same to be paid that he had no funds in said bank against which he was entitled to draw said check or out of which same could be paid—and he did then and there, for the fraudulent purpose of misapplying said funds of said bank, pay and cause to be paid said check.

Amount..... $3,736.60

January 4th, 1897.—To amount paid and caused to be paid to the Union national bank by J. M. McKnight, president of the German national bank, out of the funds of said German national bank, on a check of the said McKnight, said McKnight knowing at the time that he had no funds in said German national bank against which he was entitled to check or out of which said check could be paid; but fraudulently and with the intent to willfully misapply the funds of said bank and to convert same to his own use and benefit and that of the Union national bank, did pay and cause to be paid said check.

Amount $379.96

April 6th, 1895.—Demand note of German Shoe Company for $2,500.00, October 30, 1895, demand note of German Shoe Company

for $1,000.00, January 2nd, 1896, ninety-day note of German Shoe Company for $900.00.

Said notes being entitled to an offset of $740.29, as of date January 18th, 1897, the date of the suspension of said bank, by reason of that amount being to the credit of the shoe company in their open account—that at the time of the execution of the said notes and all of them the said McKnight was a stockholder and officer in the said German Shoe Company, and that he then and there well knew that said notes were not good and bankable paper, and that said loans and each of them were made without the knowledge or consent of the board of directors of said German national bank or the discount and exchange committee thereof, and that loans were made and caused to be made of the said amounts out of the funds of the said bank, by the said J. M. McKnight, president aforesaid, for the fraudulent purpose of willfully misapplying the funds of said bank and converting same to his own use and benefit and that of the German Shoe Company.

6

Amount $4,400.00

On November 21st, 1896, said J. M. McKnight was indebted to the German national bank in the sum of $7,127.94, evidenced by a promissory note held by said bank, signed "S. E. Edmunds & Co." and the said J. M. McKnight being a member of the firm of S. E. Edmunds & Co. That the said J. M. McKnight did cause the said Edmunds to execute to the German national bank a note, dated November 19th, 1896, payable on demand, for $2,127.94, with interest from maturity, and that he did cause said Edmunds to execute another note, dated November 16th, 1896, to the German national bank, payable in sixty days, for $5,062.32, with interest from maturity; that said McKnight as president aforesaid, did place said notes in said bank in lieu of the $7,127.94 note and withdrew the said last-named note from the assets of said bank, thereby canceling the indebtedness of said S. E. Edmunds & Co. and attempting to release himself from the said original note held by the said bank against said S. E. Edmunds & Co.; that on said original note and to secure the payment of same there were certain collaterals deposited, which affiant believes he will be able to realize thereon sufficient to pay the $5,062.22 note, except $500.00 thereon; but that he does not believe that he can realize any more; that the change of said notes as aforesaid and the releasing of J. M. McKnight thereon was done for the fraudulent purpose of defrauding said bank and for his own use and benefit, without the knowledge or consent of the directors or exchange and discount committee.

Amount $2,627.94

March 19th, 1895.—To amount of demand note, executed by the said J. M. McKnight to the said German national bank and caused to be discounted by the said bank by the said J. M. McKnight, which note at the time was entirely worthless and so known to the said McKnight to be, and was so discounted as aforesaid without

the knowledge or consent of the board of directors of said
7 German national bank or the discount and exchange committee thereof.
Amount $1,000.00

To sundry items carried and caused to be carried in said bank by said J. M. McKnight, as cash items, namely, $25, $76, $25, $10, $15, $45 and $47.15, the proceeds of which *has* been misapplied by the said McKnight, without the knowledge or consent of the directors or exchange committee.

Amount $443.15

Making total loss $18,742.74

Plaintiff says that he has not the original bonds and cannot file same herewith; that he cannot say where said bonds *is*, as he has no information, but he believes and states and charges that same *was* delivered up to said company at the time of the execution of said renewal receipts; therefore he cannot and does not state specifically the terms and conditions of the said bond herein. He says that on July 2nd, 1897, proof of said claim, as herein set forth, was duly made by him as required by the terms and conditions of said bond and demand of payment thereof made of said defendants by presenting said proof of claims both at said home office in the city of Louisville, Kentucky, and sending same to their office in Baltimore, Maryland. That said amount or no part thereof has ever been paid, but is still due and owing, and that — the time of the execution of said bond and also the said renewal receipts, same *was* delivered by the defendants to said bank and duly accepted by them, and thereunder said McKnight entered upon and continued in the discharge of the office aforesaid.

Wherefore plaintiff says that they have been damaged in the amount above mentioned.

Wherefore they pray judgment against the defendants for the sum of ten thousand dollars ($10,000.00), with interest and costs, and for other necessary and proper relief.

W. M. SMITH,
Attorney for Plaintiff.

8 Renewal receipts hereto attached are as follows:

Security department.

No. 2360. Amount, $10,000.
Premium, $40.

Fidelity and Deposit Company of Maryland.

Home office, Baltimore, Md.

In consideration of the sum of forty and $\frac{00}{100}$ dollars, the Fidelity and Deposit Company of Maryland hereby guarantees the fidelity of Jacob M. McKnight, president, in the sum of ten thousand dol-

lars in favor of the German national bank, Louisville, Ky., from the first day of June, 1895, to the first day of June, 1896, subject to all covenants and conditions set forth and expressed in the bond of this company, No. 5002, heretofore issued on the first day of June, 1894.

[SEAL.] E. M. WARFIELD, *President*,
THOS. T. BERRY,
Acting Secretary.

Security department.

No. 4043. Amount, $10,000.
Premium, $40.

Fidelity and Deposit Company of Maryland.

Home office, Baltimore, Md.

In consideration of the sum of forty and $\frac{00}{100}$ dollars, the Fidelity and Deposit Company of Maryland hereby guarantees the fidelity of Jacob M. McKnight, president, in the sum of ten thousand dollars, in favor of the German national bank, Louisville, Ky., from the first day of June, 1896, to the first day of June, 1897, subject to all the covenants and conditions set forth and expressed in the bond of this company, No. 5002, heretofore issued on the first day of June, 1894.

[SEAL.] E. M. WARFIELD, *President.*
H. E. BOSLER, *Secretary.*

9 Upon — there issued the following process:

The President of the United States of America to the marshal of the Kentucky district, Greeting:

You are commanded to summon the Fidelity and Deposit Company of Maryland to answer on the first day of the next February term of the circuit court of the United States for the district of Kentucky, to be held at the city of Louisville, a petition against it in said court by R. H. Courtney, receiver of the German national bank, and warn it that upon its failure to answer, the petition will be taken for confessed, or it will be proceeded against for contempt, and you will make due return of this summons on the first — of the next term of said court.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, at Louisville, in the said district, this 5th day of February, in the year of our Lord 1898, and of our Independence, the 122d.

THOS. SPEED,
C. C. C., K. D.,
By HENRY F. CASSIN, *Deputy.*

And the marshal made the following return thereon:

Executed on the Fidelity & Deposit Co. of Maryland by delivering a true copy of the within to Willis S. Mullen, gen'l ag't of said Co., this 5th day of February, 1898.

A. D. JAMES, *U. S. M.*,
By W. A. BLACKBURN, *D. M.*

And on the 15th day of March, 1898, came the defendant, Fidelity & Deposit Company of Maryland, and filed its answer in the above-styled cause.

Said answer is as follows:

United States Circuit Court for the District of Kentucky.

R. H. COURTNEY, Receiver,
vs.
FIDELITY & DEPOSIT COMPANY OF MARYLAND.

Answer of Defendant.

The Fidelity and Deposit Company of Maryland, for answer to the petition herein, says:

10 First. That it is a corporation organized and existing under and by virtue of the laws of the State of Maryland, and a resident thereof, and a resident of the United States, district of Maryland, and is not a resident or inhabitant of the district of Kentucky, and that the circuit court of the United States in and for the said district of Kentucky has no jurisdiction of this action.

Second. This defendant has no knowledge or information sufficient to form a belief that Jacob M. McKnight, the person named in the petition, feloniously or otherwise embezzled, abstracted or willfully misapplied moneys, securities or other personal property belonging to the said association, to the amount of $18,742.74 or in any amount whatever, or that the German national bank, mentioned in the said petition, has sustained pecuniary loss to the said amount or to any other amount, or that the accounts of Jacob M. McKnight, or any of them, were dishonest or fraudulent or that said bank had at all times or at any time complied with the conditions of the said bonds mentioned in the petition. And this defendant has not sufficient knowledge or information to form a belief that the said bank suffered any loss, or that any loss has not been made good, or that the said bank held or holds no other bond or guaranty of surety for said loss.

Third. This defendant has no knowledge or information sufficient to form a belief that on July 11, 1894, or at any other time the said Jacob M. McKnight collected the amount of $252.09 or any other amount from the Columbia Finance & Trust Company, or that he misapplied the same or any part thereof to his own use and benefit, or that he never accounted to the bank therefor.

Fourth. The defendant has no knowledge or information sufficient to form a belief that the German national bank ever paid $1,000 or

any other sum on a check of S. E. Edmonds, as alleged in the said petition, or that the said McKnight paid or caused to be paid to the said S. E. Edmonds any sum upon any such check, or that said McKnight then knew that the said Edmonds had no funds in the said bank against which he was entitled to make checks, or that the said McKnight paid or caused to be paid the same, for the fraudulent purpose of willfully misapplying said amount or to defraud the bank of the same.

Fifth. The defendant says that it has no knowledge or information sufficient to form a belief that the said Jacob M. McKnight paid or caused to be paid M. A., D. A. and J. G. Sachs the sum of $1,253.00, or any other sum, on his own check on or about
11 Jan. 21, 1896, as alleged in the said petition, or that the said McKnight knew at the time that he had no funds in the said bank against which he was entitled to check, or that he fraudulently or willfully misapplied the funds of the said bank in the payment of the said check, or applied the same to his own use and benefit.

Sixth. The defendant has not sufficient knowledge or information to form a belief that the said Jacob M. McKnight paid F. A. Britt and J. W. Reeder, or either of them, the sum of $2,000 or any other sum, on a note executed by them, as alleged in the petition, payable to the order of themselves and endorsed by them or otherwise, or that said note was payable to the said German national bank, or that the said J. M. McKnight knew that the said Britt and Reeder were both insolvent, or that the said paper was worthless, or that he paid them any money for the fraudulent purpose of willfully misapplying said amount or any amount to his own use and benefit, or that of said Britt and Reeder, or for defrauding said bank of said money, or that it was without the knowledge and consent of the directors or of the exchange and discount committee.

Seventh. The defendant denies that it has sufficient knowledge or information to form a belief that in February or March, 1896, or at any other time, the said Jacob M. McKnight paid or caused to be paid, out of the funds of said bank, to M. A., D. A. and J. G. Sachs the sum of $1,650, or that any such payment was made or caused to be made for the fraudulent purpose of willfully misapplying said funds to his own use and benefit or that of the said Sachs, or that the same was paid upon the check of the said McKnight, or that said McKnight knew at the time that he had no funds in the said bank against which he was entitled to check, or out of which said check could be paid.

Eighth. The defendant has not sufficient knowledge or information to form a belief that the said Jacob M. McKnight drew a check on June 8, 1896, or at any other time, on the German national bank for $3,736.60, as alleged in the petition, or that the same was paid out of the funds of the said German national bank, or that the said McKnight knew, at the time he paid or caused the same to be paid, that he had no funds in the said bank against which he was entitled to draw said check or out of which the same could be paid, or that

he did pay or cause to be paid the same for the fraudulent purpose of misapplying said funds of said bank.

Ninth. The defendant says that it has not sufficient knowl-
12 edge or information to form a belief that the said Jacob M. McKnight paid or caused to be paid on Jan. 4, 1897, or at any other time, to the Union national bank the sum of $379.96 or any other sum, as alleged in the petition, or that said McKnight made any such check, or knew at the time that he had no funds in the said German national bank against which he was entitled to check or out of which said check could be paid, or that he fraudulently or with the intent to willfully misapply the funds of the said bank, or to convert the same to his own use and benefit, or that the Union national bank paid or caused to be paid any such check.

Tenth. The defendant has not sufficient knowledge or information to form a belief that the German Shoe Company ever executed any note or notes for $2,500, $1,000 or $900, or any other sum, as alleged in the said petition, or that the said notes were entitled to an offset of only $740.29, or that that was the correct amount to the credit of the shoe company on the date of the suspension of the said bank, or that the said McKnight was a stockholder or officer in the said German Shoe Company, or that he knew that said loans and each of them were made without the knowledge or consent of the board of directors of the said German national bank and the discount and exchange committee thereof, or that such loans or any of them were made out of the funds of said bank for the fraudulent purpose of wilfully misapplying the funds of said bank, or of converting the same to his own use and benefit, or that of the German Shoe Company.

Eleventh. The defendant has no knowledge or information sufficient to form a belief that on Nov. 21, 1896, or at any time, the said Jacob M. McKnight was indebted to the German national bank in the sum of $7,127.94, evidenced by a promissory note held by said bank, signed, "S E. Edmunds & Co.," as alleged in the petition, or that the said McKnight was a member of the firm of S. E. Edmunds & Co., or that the said McKnight caused the said Edmunds to execute to the German national bank a note, dated Nov. 19, 1896, payable on demand, for $2,127.94, or that he caused him to execute another note, dated Nov. 16, 1896, to the German national bank for $5,062.22, or that said McKnight did place said notes in said bank in lieu of the pretended note of $7,127.94, or that he withdrew any such note from the assets of said bank, or that he attempted to release himself from such note, or that the collaterals deposited to secure such notes would only realize the sum of $5,062.22, except $500.00, or that the plaintiff believes that he cannot realize
13 any more, or that the alleged change of such notes and the release of McKnight was done for the fraudulent purpose of defrauding said bank, or for his own use and benefit, or was without the knowledge of the directors and exchange and discount committee.

Twelfth. The defendant denies that it has sufficient knowledge or information to form a belief that the said J. M. McKnight executed

a demand note on the said German national bank for the sum of $1,000 on March 19, 1895, as alleged in the said petition, or that he caused it to be discounted, or that it was entirely worthless or was so known to the said McKnight, or that it was discounted without the knowledge or consent of the board of directors of the said bank or the discount and exchange committee thereof.

Thirteenth. The defendant denies that it has sufficient knowledge or information to form a belief that the said Jacob M. McKnight carried or caused to be carried in said bank such items, or any items, as alleged in the petition, viz., $25.00, 76.00, $25.00, $10.00, $15.00, $45.00 and $47.15, or that the proceeds of such items had been misapplied by the said McKnight without the knowledge or consent of the directors or of the exchange and discount committee.

Fourteenth. The defendant says that the bonds mentioned in the petition as having been executed by this defendant were never afterwards delivered to it, and this defendant has not sufficient knowledge or information to form a belief as to whether there were any specific terms and conditions of the said bond, except so much thereof as was contained in a printed form furnished by the defendant, and whether or not the specific terms and conditions were inserted in writing.

Wherefore, plaintiff prays to be dismissed, with its costs, and for all proper relief.

ST. JOHN BOYLE. *For Def't.*

Willis S. Mullen says that he is general agent of the defendant, and that he believes the statements in the foregoing answer to be true.

WILLIS S. MULLEN.

Sworn to before me by Willis S. Mullen this Nov. 17, 1897.

R. A. BATMAN,
N. P., J. Co., Ky.

My com. expires Jan'y 25, 1900.

14 And on the 19th day of April came the parties, by their attorneys. The court being now fully advised of the defendant's motion to file an amended answer herein, it is therefore considered by the court that said motion be and the same is hereby sustained, and said amended answer is now ordered filed.

Amended answer above referred to is as follows:

United States Circuit Court for the Sixth District of Kentucky.

R. H. COURTNEY, Receiver of the German National Bank,
vs.
THE FIDELITY & DEPOSIT COMPANY OF MARYLAND.

Amended Answer.

Paragraph 15th. The defendant, The Fidelity & Deposit Company of Maryland, by leave of court, amends its answer herein and says: In the bond executed by the defendant to the German national bank

for the fidelity of J. M. McKnight, as president of said bank, and to the effect that defendant would hold said German national bank harmless from any loss caused by any fraudulent act or acts of said McKnight during the continuance of said bond while he was in the performance of the duties of the said office, it was expressly stipulated and agreed by the defendant and the said German national bank as follows: "That the said German national bank shall immediately give the company notice in writing of the discovery of any default or loss hereunder, and shall file with the said company his or their claim hereunder, with full particulars thereof, as soon as practicable thereafter, and no claim which shall not be so filed by the employer (German national bank) with the Fidelity & Deposit Company within six months after the expiration or cancellation of this bond, or within six months after the employé shall have ceased to be in the employer's service, shall be payable hereunder."

It was also expressly stipulated and agreed between this defendant and the said German national bank in said bond as follows: "That upon notification to the Fidelity & Deposit Company of any loss hereunder, the said Fidelity & Deposit Company's liability shall thereupon terminate as regards any subsequent act of the employé, J. M. McKnight."

"That the employer, the German national bank, shall observe due and customary supervision over the employé, J. M. McKnight, for the prevention of default, and if the employer, the German national bank, shall at any time during the currency of this bond condone any act or default on the part of the employé, McKnight, which would give the employer, the German national bank, the right to claim thereunder, and shall continue the employé, McKnight, in its service without written notification to the Fidelity & Deposit Company, the said Fidelity & Deposit Company shall not be responsible hereunder for any default of the employé, McKnight, which may occur subsequent to such act or default so condoned."

"That there shall be a complete inspection of the accounts and books of the employé, McKnight, on behalf of the employer, the German national bank, at least once in every twelve months from the date of this bond (June 1, 1894), such inspection to include examination of all cash and securities of which the employé, McKnight, shall have custody or charge."

"That the employé, McKnight, has not, within the knowledge of the employer, the German national bank, been at any time in arrears or default in either this or other employment."

"That the employer, the German national bank, shall at once notify the said company on becoming aware of the employé, McKnight, being engaged in speculation or gambling, or indulging in any disreputable or unlawful habits or pursuits."

"That the company may, upon giving one month's notice in writing to the employer, cancel its responsibility hereunder in so far as concerns the acts or defaults of the employé, McKnight, subsequent to the end of said month; *and* which event it will, upon request of employer, the German national bank, refund the proportion of the premium paid for the unexpired term of this bond."

All of the foregoing stipulations and agreements were made a part of said bond by the said German national bank and the said McKnight and this defendant; and without said stipulations and agreements, this defendant would not have entered into or executed said bond, and said McKnight and said bank knew this.

The defendant says that prior to January 21, 1896, said McKnight did indulge in speculation in whisky and tobacco, and in disreputable and unlawful habits and pursuits, and this was
16 known to the cashier and teller and vice-president of the said bank, the said vice-president being also a director, and to the other officers and directors of said bank and to said bank, but the said German national bank did not notify this defendant of any of such irregular and unlawful acts or improper conduct or defaults of said McKnight, and this defendant had no notice thereof for more than a year thereafter; and said bank condoned the acts and defaults and conduct of said McKnight without the knowledge or consent of this defendant, and continued him in office; and if defendant had learned of said acts of said McKnight it would have discontinued and canceled and abrogated said bond at once, as it had a right to do.

The defendant says that the act of said McKnight in executing and causing to be discounted by said German national bank the demand note of March 19th, 1895, for $1,000.00 executed by him and set out in the petition, was known at once to the teller and cashier and vice-president of said bank; and the directors of said bank knew of this act of his at once or within a few days thereafter, and acquiesced in and approved the same; and said German national bank did not notify this defendant of said acts or defaults of said McKnight for more than two years thereafter, and it acquiesced in and condoned the said acts and defaults of said McKnight without the knowledge or consent of this defendant, and continued him in office, and said bank did not file its claim against this defendant under said bond or make a demand of this defendant for said act or default of said McKnight with full or any particulars thereof as soon as practicable thereafter, nor until after February 1st, 1897.

The defendant says that the payment to S. E. Edmunds on his check on January 21, 1896, of $1,000.00 as set out in the petition was made by the teller and cashier of said bank, not by said McKnight, but at his request, and said payment of said check was immediately known to the vice-president and one or more other directors, and the whole transaction and the reasons for it were well known to said teller and cashier and vice-president, and to one or more of the directors immediately and in a few days thereafter became known to a majority of said directors and to said bank, and they acquiesced in or condoned the act or default of said McKnight, and all of said directors knew it and said bank knew it. But neither said bank nor any one of said directors ever notified this defendant thereof, and said bank never made a claim or demand against this defendant on account thereof until long after said bank was closed in
17 1897, and this defendant knew nothing of said transaction for more than a year thereafter.

Said teller and cashier, when he paid said check, knew, and so

did the vice-president, that S. E. Edmunds was insolvent, and had no funds to his credit in said bank; and if defendant had been informed of said transaction it would have discontinued and canceled and abrogated said bond at once, as it had a right to do.

Said sum of $1,253.00, which it is alleged in the petition was paid to M. A., D. A. & J. G. Sachs, by J. M. McKnight on January 21st, 1896, was in fact paid by the teller and cashier of said bank at the request of said McKnight, and on his check, and said payment on said day became known at once to the vice-president, and to one or more of the directors of said bank, and to said bank and all of said directors of said bank learned of it in a few days; and they acquiesced in and condoned the act or default of said McKnight without the knowledge or consent of the defendant, and continued him in office and never notified defendant thereof and never made a claim or demand of defendant on account thereof for more than a year; and if defendant had been informed of said transaction it would have discontinued and canceled and abrogated said bond at once, as it had a right to do.

The sum of two thousand dollars ($2,000.00), which, it is alleged in the petition, was paid to F. A. Britt and J. W. Reeder on their note February 6th, 1896, was in fact paid by the teller and cashier of said bank at the request of said McKnight, and said transaction became known on the night of that day to one other director of said bank, who was vice-president, and who did not take part therein, and to said bank, and in a few days thereafter all the other directors of said bank knew it; and said directors acquiesced in and condoned said act or default of said McKnight without the knowledge or consent of defendant, and they continued said McKnight in his office and never notified defendant of his said act or default, and never made any claim or demand on defendant on account thereof for more than a year; and if defendant had been informed of said transaction it would have discontinued and canceled and abrogated said bond at once, as it had a right to do.

The defendant says that the payment to M. A., D. A. & J. G. Sachs on the check of J. M. McKnight in February or March, 1896, for $1,650.00, as set out in the petition, was made by the teller and cashier of said bank, not by said McKnight, though at his request,
18 and said payment of said check was immediately known to the vice-president and one or more of the directors of said bank, and was known also to said bank immediately and in a few days thereafter became known to a majority of the directors of said bank, and the said bank acquiesced in and condoned the act or default of said McKnight, but neither the said bank nor any of the said directors or officers ever notified this defendant thereof, and said bank never made any claim or demand of this defendant on account thereof until long after said bank was closed in 1897; and this defendant knew nothing of said transaction for more than a year thereafter. Said teller and cashier and said vice-president and director and said bank knew what funds, if any, said McKnight had in said bank at said date, and knew whether he was overdrawn at the time or not.

The defendant says that the payment to the Union national bank on June 8, 1896, on the check of J. M. McKnight for $3,736.60, as set out in the petition, was made by the teller and cashier of said bank, not by said McKnight, but at his request, and said payment of said check was immediately known to the vice-president of said bank and one or more of the directors of said bank; and said bank knew of said matter at once, and said directors and officers of said bank acquiesced in and condoned the act or default of said McKnight without the knowledge or consent of the defendant, and continued him in office and never notified defendant thereof, and never made any claim or demand of defendant on account thereof for more than half a year, and if defendant had been informed of said transaction it would have discontinued and canceled and abrogated said bond at once, as it had a right to do.

The defendant says that the payment of $379.96 to the Union national bank on January 4, 1897, on the check of the said J. M. McKnight on the German national bank was paid to said Union national bank or on its order by the teller and cashier of said German national bank at the request of said McKnight and on his check; and said payment on said date became known at once to the said bank and to the vice-president and one or more of the directors of said bank, and all of said directors of said bank learned of it in a few days and they acquiesced in and condoned the act or default of said McKnight without the knowledge or consent of the defendant, and continued him in office and never notified defendant thereof, and never made any claim or demand of defendant for several months, and if defendant had been informed of said transaction it would have discontinued and canceled and abrogated said bond at once, as it had a right to do.

19 The defendant says that the loan to the German Shoe Company on April 6, 1895, on a demand note for $2,500.00, and the loan to the said German Shoe Company on October 30, 1895, on a demand note for a thousand dollars ($1,000.00), and the loan to the said German Shoe Company of January 2, 1896, on a ninety-day note of said company for nine hundred dollars ($900.00) were all made in due course of business by the said German national bank and with a regular customer who had for some time been doing business with said bank, and each of said loans was made with the knowledge and consent of the cashier and teller of said German national bank, and with the knowledge and consent of the vice-president of said bank, who was a director of said bank, and with the knowledge and consent of said bank itself, and each of said loans became known in a few days thereafter to all the directors of said bank and was reported to them within one week after each loan in the due course of business; and said directors acquiesced in and approved and condoned the act of said McKnight in lending said money to said German Shoe Company, and said directors gave their approval thereto without the knowledge and consent of defendant, and they continued said McKnight in office and never notified defendant of each of said loans to said German Shoe Company, and never made any claim or demand of defendant on account

thereof for more than a year thereafter, and if defendant had *had* been informed of said transaction and had been thus notified by the said bank, it would have discontinued and canceled and abrogated said bond at once, as it had a right to do.

The defendant says that the cancellation by said McKnight on November 21, 1896, of the promissory note held by said bank and signed by S. E. Edmunds and Company, and the acceptance by said McKnight of S. E. Edmunds of two notes to the German national bank, one of them being dated November 19th, 1896, and payable on demand for $2,127.94 and the other dated November 16th, 1896, to the German national bank and payable in sixty days for $5,062.22, was known immediately to the cashier and teller of said German national bank and the vice-president thereof, who was a director thereof, and to the bank, and became known within a week thereafter to all the directors of said bank, and they acquiesced in and approved and condoned the said act or acts or default of said McKnight, without the knowledge or consent of the defendant, and said bank continued said McKnight in office and never notified the defendant thereof, and never made any claim or demand of defendant on account thereof for four or five months thereafter, and if defendant had been informed of said transaction, it would have discontinued and canceled and abrogated said bond at once, as it had a right to do.

The defendant says that the sundry items carried and caused to be carried in said bank by said McKnight as cash items, namely, $25.00, $76.00, $25.00, $10.00, $15.00, $45.00 and $47.15, as set out in the petition, were so carried as cash items by the teller and cashier, and with the knowledge of the vice-president of said bank, who was a director thereof, and with the knowledge of said bank, and all of the officers and directors of said bank learned of said acts of said McKnight and said cashier and teller within a few days thereafter, and the said bank and the said directors acquiesced in and approved and condoned the acts or default of the said McKnight without the knowledge or consent of defendant, and continued him in office and never informed the defendant thereof, and never made any claim or demand of the defendant on account thereof for many months thereafter, and if defendant had been informed of any of said actions it would have discontinued and canceled and abrogated said bond at once, as it had a right to do.

The defendant says that the amount collected on July 11, 1894, as set out in the petition, by McKnight, as president of the German national bank, of $252.09 of the funds of said bank from the Columbia Finance & Trust Company, agents of Attilla Cox, assignee of J. G. Mattingly & Sons, on a claim owing by said J. G. Mattingly & Sons to said bank, was improperly collected by said McKnight, with the knowledge and consent of the cashier and teller of the German national bank, and with the knowledge and consent of the vice-president thereof, who was a director, and with the knowledge and consent of the said bank. Said McKnight had no power or authority to collect said sum, and did not collect the same as president of said German national bank, but as an individual, and he retained

the same, with the knowledge and consent of said bank and its officers, and they acquiesced in and condoned the act or default of said McKnight therein, without the knowledge or consent of this defendant, and continued him in office, and never notified the defendant thereof, and never made any claim or demand of defendant on account thereof for nearly three years, and if defendant had been informed of said transaction it would have discontinued and canceled and abrogated said bond of McKnight at once, as it had a right to do.

21 The defendant says that from June 1st, 1894, until said bank was closed in 1897 Rudolph Reutlinger was both teller and cashier of said German national bank. and as such had charge of such financial affairs of the said bank as pertained to said offices; that said Rudolph Reutlinger's father, namely, Adolph Reutlinger, from June 1st, 1894, to December 5th, 1896, was vice-president and director of said bank, and was daily and constantly in said bank and was thoroughly familiar with all its business affairs and with the acts and doings and defaults of said McKnight as president, and with the acts and doings of the teller and cashier of said bank; said Adolph Reutlinger had been president and director of said bank from 1874 to January 1st, 1895, that is, until said McKnight became president thereof, and said Adolph Reutlinger was president for six or seven months in 1894, while said McKnight was vice-president of said bank; said Adolph Reutlinger was an expert banker and had his office in said bank building until December 5, 1896, and was in and around the offices and banking-room of said bank every day and at all times of day.

The board of directors of said bank met weekly in the building of said bank and the commercial paper and notes and drafts discounted and loans made in said bank were known at once to the teller and cashier and vice-president of said bank, and were read out to said directors each week by the officers of said bank, and the overdrafts were read each week to said directors, as they well knew; and said overdrafts were always known at once to the teller and cashier, to the vice-president, who was a director, and were known in a week to all the directors.

Paragraph 16. From January 1st, 1894, till said bank was closed in January, 1897, the books thereof were out of balance, and the discrepancy amounted to several thousands of dollars, and this was well known to the officers and directors of said bank, but was not known to the defendant. Said books were out of balance about $3,000.00 when said McKnight was elected vice-president on April 18th, 1894, and also when he was elected president in January, 1895, and this continued during all the time he was president, but this was not known to defendant until after said bank was closed in 1897; and if defendant had known of this improper and dangerous condition of said books, which offered additional temptations to the officers for illegal and improper acts and defaults, it would not have become surety on said bond, and, if it had learned of these facts after the execution of said bond, it would have canceled and revoked same at once, as it had a right to do.

22 Paragraph 17. Prior to January 1st, 1896, said McKnight was frequently allowed by said German national bank to overdraw to a large amount his personal account in said bank, and on January 18th, 1896, his overdraft amounted to $1,340.14, on January 20th, 1896, he was overdrawn $1,460.14, and on June 8th, 1896, he was overdrawn $626.23, and on September 11, 1896, $431.57, and constantly, both before and after said dates, he was overdrawn to a large amount, and these irregular acts and defaults of said McKnight were known at the time by the cashier and teller and vice-president and by the directors of said bank, and were acquiesced in and condoned by said directors, who never notified the defendant thereof, and they continued him in office without the knowledge of the defendant of his said acts or defaults, and the defendant never learned thereof until long after said bank was closed in January, 1897.

By their irregular and improper practices the directors of said bank encouraged said McKnight in violating and neglecting his duty as president, and they condoned his misconduct and withheld said information from the defendant, and this defendant would have canceled said bond, and would not have remained upon his bond if it had known of his said misconduct.

The defendant says that the German national bank did not observe or cause to be observed due and customary supervision over the said J. M. McKnight for the prevention of his default or to prevent him from doing any improper act that would cause loss to said bank or to this defendant, but, on the contrary, said bank recklessly and knowingly allowed him to perform duties and to do acts that did not properly appertain to the office of president of said bank; and said bank, when it learned of his irregular and improper acts and defaults, constantly and knowingly acquiesced therein and condoned his wrongful acts, and continued him in his office, and, in spite of such knowledge, re-elected him again and again, and never notified this defendant of any of his improper or wrongful acts, or of any of his defaults, and this company never learned thereof until long after January 17th, 1897. The officers and directors of said bank allowed him to run the affairs of said bank as he pleased, and they did not carefully inspect his transactions, accounts and books at least once in every twelve months, and did not inspect and examine the cash and securities and notes and drafts of which he had custody or charge, or to which he had access. When said bond of June 1st, 1894, given by defendant to said bank for the fidelity of said McKnight, as set out in
23 the petition, was renewed for another year on June 1st, 1895, to cover the period from that date to June 1, 1896, and was again renewed and continued on June 1st, 1896, to cover the period from that date to June 1st, 1897, said bank, through an officer other than said McKnight, represented and asserted and certified, with the knowledge of the directors of the said bank, that the books and accounts of said McKnight had been examined by said bank and were then found to be correct in every respect, and that all moneys handled by him had been accounted for up to that time, and that

he had performed his duties in an acceptable and satisfactory manner, and that said bank knew of no reason why the guaranty bond executed by this defendant should not be continued; but defendant says that, in fact, said statements, assertions, and certificates were, and each of them was, false and fraudulent, and known by said bank to be false and fraudulent, but the defendant did not know the same to be false or fraudulent, and, on the contrary, the defendant believed and relied on said statements and each of them, and but for said statements, assertions, and certificates, the defendant would not have renewed or continued said bond on June 1st, 1895, or June 1st, 1896, and the defendant would immediately have canceled and revoked said bond, as it had a right to do, and as the said bank knew it had a right to do. The said bank purposely withheld from the defendant the proper information as to the acts and conduct and accounts of said McKnight, and thus misled and deceived the defendant.

Wherefore, the defendant prays to be hence dismissed with its costs herein, and for all proper and general relief.

ST. JOHN BOYLE AND
EDWARD J. McDERMOTT,
Attorneys for Defendant.

Willis S. Mullin says that he is the general agent of the Fidelity and Deposit Co. of Maryland in this city and State; that he has charge of all of the business of said company in this city and State, and has authority to represent it, and that the statements of the foregoing answer are true.

WILLIS S. MULLIN.

Subscribed and sworn to by Willis S. Mullin before me this 18th day of April, 1899.

THOS. SPEED, *Clerk*,
By HENRY F. CASSIN, *D. C.*

24 And on the 1st day of May, 1899, came the plaintiff, by W. M. Smith, his attorney. Came also defendant, by St. John Boyle and E. J. McDermott, its attorneys. The parties, by their said attorneys, filed their written agreement herein, which is as follows: "It is hereby agreed that the first paragraph of the defendant's answer filed herein, be and the same is hereby withdrawn—said paragraph being as follows: 'That it is a corporation organized under and by virtue of the laws of the State of Maryland, and a resident thereof, and a resident of the United States, district of Maryland, and is not a resident or inhabitant of the district of Kentucky, and that the circuit court of the United —, in and for the district of Kentucky, has no jurisdiction in this action.'" Came again the plaintiff by his said attorney and filed his reply herein. Came again the parties and thereupon the defendant moved the court to strike out from the reply the following clause: "That he has never seen said bond and does not know the specific terms and conditions thereof; that he has not knowledge or information sufficient to form

a belief as to whether or not said terms and conditions set out in defendant's amended answer or any of them are included in the said bond or made a part thereof." And by consent of the plaintiff it is ordered that said motion be and the same is hereby sustained and said parts are stricken from said reply. Came the defendant by its attorneys and filed its amended answer herein, and by consent of parties it is ordered that the affirmative allegations of said amended answer are controverted of record.

Thereupon came a jury, to wit: Robert Redman, John W. Fair, Frank G. Gault, H. F. Lion, Wm. T. Jasper, James E. Breed, Charles A. Hilger, Z. W. Clore, James Walters, W. L. Purcell, M. J. Winn and E. S. Tuley, who were elected, tried and sworn to well and truly *tried* the issue joined. On motion it is ordered that W. C. Furnas be and he is hereby appointed stenographer herein.

The evidence was heard in part, and there not being time to conclude same today, time is given until tomorrow. It is ordered that the jury do adjourn until tomorrow morning at 9½ o'clock.

Reply above referred to is as follows:

United States Circuit Court for the Sixth District of Kentucky.

R. H. COURTNEY, Receiver of the German National Bank, Plaintiff,
vs.
THE FIDELITY AND DEPOSIT COMPANY OF MARYLAND, Defendant.
} Reply.

The plaintiff, R. H. Courtney, receiver of the German national bank, in reply to the amended petition filed herein, says that he has not the original bond filed herein, and having made diligent search therefor, he is unable to find same, that same was returned to defendant when the renewal receipts were given, or is lost or misplaced so that it cannot be found, and plaintiff does not know which of these allegations is true, but one of them is. That he has never seen said bond, and does not know the specific terms and conditions thereof, that he has not knowledge or information sufficient to form a belief as to whether or not said terms and conditions set out in defendant's amended answer, or any of them are included in said bond, or made a part thereof, or whether or not without said stipulations defendant would not have entered into or executed said bond or that said J. M. McKnight or said bank knew this.

Plaintiff says that he has no knowledge or information sufficient to form a belief as to whether or not prior to January 21, 1896, J. M. McKnight indulged in speculation in whisky or tobacco or in disreputable and unlawful habits, or pursuits; he denies that the cashier or teller or vice-president of the German national bank or the directors of said bank had any such knowledge in regard to said McKnight or that said bank condoned any such acts, defaults or conduct of said McKnight, except they have lately obtained information as alleged in petition herein, and plaintiff has no knowledge or

information sufficient to form a belief as to whether or not defendant, if it had learned of said fact, would have canceled said bond.

Plaintiff denies the execution, and discounting in said bank by J. M. McKnight, of his note for $1,000.00, dated March 19th, 1895, was known at once to the teller or cashier or vice-president of
26 said bank, or that the directors of said bank knew of same at once, or within a few days thereafter, or that said officers or directors, or any of them, knew of the same until just a short time before said failure, and then only the teller learned that such a note had been discounted, but no further. That the facts and circumstances of said discounting were not known or learned by said teller or any of said officers or directors until some time after the bank went into the hands of a receiver; that said note was discounted by said J. M. McKnight as president, who had authority to discount paper, and the fact thereof was concealed by him from said bank, he causing said note to be carried in the discount loans as demand loan. He denies that said bank or any of its officers or directors, acquiesced in or approved same, or condoned same, and that said bank by this receiver presented a claim therefor proven against this company as soon as practicable after discovery.

Plaintiff denies that the payment to S. E. Edmunds on his check on January 21st, 1896, of $1,000.00 was immediately known to the vice-president, or any one of the directors of said bank, or that the whole transaction, or the reasons for it, were known to said teller, cashier, vice-president or to any one or more of said directors, or to said bank, or that they acquiesced in or condoned the acts or defaults of said McKnight, or that all, or any of said directors, or said bank knew it. A claim therefor was made by this plaintiff of this defendant shortly after same was learned, and as soon thereafter as practicable and within six months. Plaintiff denies that when said teller and cashier paid said check, he or the vice-president knew that S. E. Edmunds was insolvent, or had no funds to his credit in said bank.

Plaintiff has no knowledge or information sufficient to form a belief as to whether or not defendant would have canceled said bond had it been informed of the facts.

Plaintiff denies that the $1,253.00 paid to M. A., D. A. and J. G. Sachs by J. M. McKnight on January 21, 1896, was paid by the teller and cashier of said bank, but same was paid through the clearing-house, on the check of said McKnight, and he denies that said payment became known at once *known* to the vice-president, or to any of the directors of said bank or to said bank, or that all or any of said directors learned of it in a few days, or that they acquiesced in or condoned the acts or defaults of said McKnight, plaintiff says that said officers of said bank did not learn of said check or the facts or circumstances of said transaction until said bank passed into
27 the hands of the receiver, and said receiver made claim for said claim of defendant, as soon as practicable after he received said knowledge and within six months thereof.

Plaintiff denies that the two thousand dollars paid to F. A. Britt and J. W. Reeder on their note of February 6th, 1896, became

known to the vice-president on the night of that day. He says that he is informed, and believes, and so states and charges that some short time thereafter said payment became known to the vice-president and some of the directors, but that McKnight informed them that it was a legitimate loan made by him to said parties, by discounting said note, that said parties were perfectly good and solvent, but that he (McKnight) would have other parties to sign said note, as further security, and that they had promised to do same.

That said officers believed and relied on said statements. He denies that any of said officers ever knew the facts and circumstances of said loans until after the bank was placed in the hands of a receiver, and he denies that the bank or said officers acquiesced in or condoned any said acts or defaults of said McKnight, and this receiver made claim for same of defendant as soon after said matter was learned of and the facts and circumstances of same, as practicable and within six months thereafter.

He denies that the payment of $1,650.00 on the check of J. M. McKnight in February or March, 1896, to M. A., D. A. and J. G. Sachs was made by the teller and cashier of said bank—but same was paid through the clearing-house, or that said payment was immediately known to the vice-president or any of said directors or to said bank immediately, or that within a few days thereafter, it became known to a majority of said directors, or that said bank acquiesced in or condoned said acts or defaults of said McKnight. He says that said matter was not known to said bank or its officers until after said bank was placed in the hands of a receiver, and this receiver as soon thereafter as practicable and within six months thereafter, made claim therefor of this defendant. He denies that said teller and cashier or vice-president or any directors or said bank knew what funds McKnight had in said bank at that time, or knew whether or not he was overdrawn.

He denies that the payment made to the Union national bank June 8th, 1896, on the check of J. M. McKnight, of $3,736.60, was made by the teller and cashier of said bank, but same was 28 paid through the clearing-house. He denies that said payment was immediately known to the vice-president, or any of said [illegible]ors of said bank, or that said bank knew of it at once, or tha[illegible]irectors, or officers of said bank, acquiesced in or condone[illegible]cts or defaults of said McKnight. He says that neither said ba[illegible]or its officers knew of said matter, or the facts and circumstances thereof, until after said bank had passed into the hands of a receiver, and then said receiver, within six months thereafter, and as soon as possible, made claim therefor of defendant.

Plaintiff denies that the $379.96 paid to the Union national bank on January 4th, 1897, was paid by the cashier and teller of said bank, but same was paid through the clearing-house. He denies that said payment became known at once to said bank, or to the vice-president, or any of the directors of said bank, or that all of the directors of said bank learned of it in a few days or that they acquiesced in or condoned the said acts or defaults of said McKnight. He says that neither said officers, or said bank knew of said matter

or the facts and circumstances thereof, until after the receiver took charge of said bank, and then said receiver made claim for said amount of defendant within six months thereafter, and as soon as practicable.

Plaintiff denies that the cancellation by McKnight on November 21st, 1896, of the promissory note held by said bank and signed by S. E. Edmunds & Company, and the acceptance by said McKnight of S. E. Edmunds' two new notes to the German national bank, one of them being dated November 19th, 1896, and payable on demand for $2,127.94, and the other dated November 19th, 1896, to the German national bank and payable in sixty days for $5,066.22 was known immediately to the cashier and teller of said German national bank, or to the vice-president thereof, or that it became known within a week thereafter to all, or any of the directors, or that they acquiesced in, approved or condoned the said act, or acts, or defaults of said McKnight. He says that said acts were not known to said officers of said bank, or said bank until after said bank passed into the hands of a receiver, and that as soon as they were learned, said receiver, as soon thereafter as practicable, and within six months thereafter, made claim for same against defendant. He says that said McKnight was the company in said firm of S. E. Edmunds & Company, to whom the money was loaned, and who signed said note; that said McKnight made the loan himself, without the knowledge or consent of the directors, or said bank. That
29 neither said bank or its officers or directors knew that said McKnight was a member of said firm until after the bank went into the hands of a receiver.

He denies that the sundry items carried in cash items were so carried with the knowledge or consent of the vice-president or with the knowledge of said bank or that all of the officers and directors of said bank learned of said acts until after said bank was placed in the hands of the receiver, and as soon thereafter as practicable, and within six months thereof, said receiver made claim therefor of defendant. That said McKnight so concealed said item from said bank, and its directors, and so confessed his account against said bank for salary, and kept the entries thereof, in such a manner, that neither said bank or its directors could tell the state of his account with the bank, and did not know the same, until after the receiver took charge of said bank.

Plaintiff says that it is true that the $252.09 collected July 11, 1894, of the assignee of J. G. Mattingly and Sons, was collected by said McKnight as vice-president and is not covered by the bond herein sued on, and same was included in said claim by mistake, but he denies that same was collected with the knowledge or consent of the cashier and teller of said bank, or the vice-president thereof, or that he retained the same with the knowledge or consent of said bank, or its officers, or that they acquiesced in, or condoned said act, or default of McKnight, or that they knew of same, or that same had not been accounted for by McKnight until after the bank passed into the hands of the receiver.

He denies that Rudolph Reutlinger, as teller and cashier of said

bank, had charge of such financial affairs of said bank as pertained to said officers, except under the immediate control and personal direction of said J. M. McKnight as president of said bank. He denies that Adolph Reutlinger, vice-president, was familiar with all the business affairs of said bank, or with the acts or doings, or defaults of said McKnight, as president, or with the acts and doings of the teller and cashier of said bank, or that he was around said bank every day, or at all times of the day. He says that the commercial paper, notes, drafts, discounts and loans made in said bank were known at once to the teller and cashier and vice-president of said bank, and were read out to said directors by the officers of said bank, except such as were withheld and concealed by said J. M. McKnight from them, or falsely reported to them by him, and of which they had no knowledge or information. He says that the overdrafts were frequently during each year read or reported to them, by the officers of said bank, and were known to the teller and cashier, vice-president and directors, except such as were withheld by said McKnight from the books of the bank, and concealed by him from them, or such as were caused to be entered by McKnight, to other accounts than those to which they belonged, or were falsely reported by him to them.

Plaintiff denies that from January 1st, 1894, till said bank was closed in January, 1897, the books thereof were out of balance, or that the discrepancy amounted to several thousand dollars, or that this was well known to the officers or directors of said bank. He denies that said books were out of balance $3,000 when said McKnight was elected vice-president on April 18th, 1894, or when he was elected president in January, 1895, or that this continued all the time he was president. He says that only one book, that was the Individual Ledger "A," was ever out of balance, and this was caused by the failure to make and carry forward some entries, was simply a mistake and oversight of the clerk of said book and as soon as the fact was ascertained the errors were sought for, found and corrected.

Plaintiff denies that the overdraft of McKnight, or any irregular acts or defaults of his, were known at the time by the cashier and teller or vice-president, or by the directors of said bank, or were acquiesced in, or condoned by said directors. He denies that by any irregular or improper practices, the directors of said bank encouraged said McKnight in violating and neglecting his duty as president, or that they condoned any of his misconduct or withheld any of said information from defendant.

He denies that the German national bank did not observe, or cause to be observed, due and customary supervision over the said McKnight for the prevention of his default, or to prevent him from doing any improper act, that would cause loss to said bank or to defendant, or that said bank recklessly and knowingly allowed him to perform duties or to do acts that did not properly appertain to the office of president of said bank, or that said bank when it learned of his irregular or improper acts, or defaults, knowingly acquiesced therein, or condoned his wrongful acts. He denies that

the officers or directors of said bank allowed him to run the affairs of said bank as he pleased or that they did not carefully inspect his transactions, accounts and books once in every twelve months, or did not inspect, or examine the cash, and securities, and
31 notes, and drafts, of which he had custody or charge, or to which he had access. He says such inspection was made at least once in every twelve months from the date of the bond, on behalf of the employer, both by said employer and by the examiner of the Comptroller of the Currency of the United States, in connection with said employer, and on behalf of said employer, as well as said comptroller.

Plaintiff says that he has no knowledge or information sufficient to form a belief as to whether or not, when said bond of June 1st, 1894, given by said defendant to said bank, was renewed of June 1st, 1896, said bank, through an officer other than said McKnight, represented, or asserted, or certified, either with or without the knowledge of the directors of said bank, that the books or accounts of said McKnight had been examined by said bank and were then found to be correct in every respect, or that all money handled by him had been accounted for up to that time, or that he had performed his duty in an acceptable and satisfactory manner, or that said bank knew of no reason why the guaranty bond executed by this defendant should not be continued; he therefore denies said entire allegation. He denies that said bank made any statement, assertion, or certificate, that was either false or fraudulent, or that was known by said bank to be either false or fraudulent. He has no knowledge or information sufficient to form a belief as to whether or not said defendant relied on any such statement, assertion or certificate, or that but for same, would not have renewed said bond.

He denies that said bank purposely withheld, or withheld at all, from the defendant the proper information as to the acts or conduct, or accounts, of said McKnight, or thus misled or deceived defendant. He says that said bank did not withhold from defendant any knowledge it had as to any wrongful or fraudulent act *act* or default, or any improper conduct of his. He says that said McKnight remained in the employ of said bank as its president under said bond as renewed until January 18th, 1897, when said bank was placed in the hands of a receiver. That immediately upon the discovery of each and every one of the losses and defaults herein sought to be recovered, he gave defendant due notice of same, and proof of each of said losses and defaults sought herein to be recovered was on the 2nd day of July, 1897, made out and presented said defendant, as required, plaintiff making claim of it, of all of said accounts of said losses and defaults, and defendant was present during said investigation by a general agent, and knew of said discoveries as
32 made, and talked with plaintiff about same and waived further notice thereof from plaintiff; that none of said losses or defaults sought to be recovered herein were found out by said bank or its directors until some time after plaintiff was appointed receiver herein.

That from June, 1894, up to the time a receiver for said bank was appointed in January, 1897, said J. M. McKnight drew a salary from said bank of $4,500 per annum. That during said entire time he so drew his salary himself, by way of check, entries and cash items, and so concealed said items and entries and confused account, that said bank did not know the state thereof, or of any of said overdrafts. He says that the said various checks given by said McKnight to M. A., D. A. and J. G. Sachs and the Union national bank, and other checks given by him, all of which — and ought to be recovered herein, he, the said McKnight, caused the clerks of said bank to so hold them in the cash items, and to then charge them up to other accounts in said bank not his own, such as the Louisville Deposit Bank collateral account, Williams' special, Edmunds & Company account, and other accounts, so that the bank did not discover them, or their payment or said loss or default until long after the bank was placed in the hands of a receiver, and when same was learned notice thereof was given immediately to defendant. He says that as to the German Shoe Company note, he finds that defendant is correct. That at the time plaintiff included same in his proof of claim against defendant he was misinformed in regard to the facts thereof, but he denies that if defendant, had been informed of said transaction, — would have canceled said bond, or that by reason thereof it would have had the right to do so.

And now having replied, he prays as in his original petition herein.

R. H. COURTNEY,
Receiver German National Bank.

Subscribed and sworn to before me, this 2nd day of May, 1899.
THOS. SPEED, *Clerk.*
W. M. SMITH,
Att'y for Pl'ff.

33 Amended answer filed on May 1st, 1899, is as follows:

United States Circuit Court for the Sixth District of Kentucky.

R. H. COURTNEY, Receiver German National Bank,
vs.
THE FIDELITY & DEPOSIT COMPANY OF MARYLAND.

Amended Answer.

The defendant, by leave of court, amends its answer herein, and says that the German national bank and its officers had immediate knowledge and notice of the doing of each of the acts or defaults of said J. M. McKnight set out in the petition and on which the plaintiff seeks to recover herein; and said bank and its officers had notice of each of said McKnight's acts, doings and defaults at the very time when his said acts, doings or defaults occurred, or within a few days thereafter, and the said bank and its officers immediately approved or condoned each of said acts, doings or defaults of said

McKnight without the knowledge or consent of defendant; and defendant was not given and did not have any notice of any one of said acts, doings or defaults of said McKnight set out in the petition with full or any particulars thereof as soon as practicable thereafter, nor until July 6, 1897, and no claim on account of any one of said acts, doings or defaults of said McKnight was ever made on or filed with defendant by plaintiff or by said bank until said date, though said bank and the plaintiff knew specifically of said acts, doings and defaults prior to January 22, 1897, and said bank knew specifically of many of them prior to January 22, 1896, and knew of many of them prior to May, 1895.

Wherefore defendant prays to be hence dismissed, with its costs herein.

BOYLE & McDERMOTT,
Attorneys for Defendant.

The statements of the foregoing answer are true.

WILLIS S. MULLIN,
Gen. Ag't & Att'y-in-fact.

Subscribed and sworn to by —— —— before me this 1st day of May, 1899.

THOS. SPEED, *Clerk.*

34 And on May 2nd, 1899, came the parties again, by their attorneys. Came also the jury pursuant to order of adjournment. The evidence and arguments of counsel were concluded, and the court having delivered its instructions to the jury, they retired to consider of their verdict, and returned into court and reported that they were unable to agree upon a verdict today, and time is given them until tomorrow. It is ordered that the jury be adjourned until tomorrow morning at 9 o'clock.

And on 3rd day of May, 1899, came again the parties, by their attorneys. Came also the jury, pursuant to order of adjournment. The jury retired to consider of their verdict, and returned into court the following verdict, to wit:

We, the jury in this case, find for the plaintiff in the sum of ten thousand dollars, $10,000, and interest from the 3rd day of October, 1897.

E. S. TULEY, *Foreman.*

It is therefore considered by the court that the plaintiff, R. H. Courtney, receiver of the German National Bank of Louisville, recover of the defendant, The Fidelity and Deposit Company of Maryland, the sum of ten thousand dollars ($10,000), the sum so found due by the jury in their verdict aforesaid, with interest thereon at the rate of six per centum per annum from the 3rd day of October, 1897, until paid; also his costs herein expended.

And on the 4th day of May, 1899, came the defendant, by St John Boyle, its attorney, and on its motion, it is ordered that it do have until June 1st, 1899, within which to prepare and file its bill of exceptions herein.

And on the 1st day of June, 1899, came the defendant, by counsel, and on its motion, it is ordered that time be extended until June 3rd, 1899, to prepare and file its bill of exceptions herein.

And on the 3rd day of June, 1899, came the defendant, by St. John Boyle & E. J. McDermott, its counsel, and tendered its bill of exceptions herein.

35 And on the 13th day of July, 1899, came the defendant, by its attorneys. The court now signs and seals the bill of exceptions tendered herein June 3rd, 1899, and orders the same to be made part of the record, which is accordingly done.

Bill of exceptions is as follows:

United States Circuit Court, Sixth Circuit and District of Kentucky.

R. H. COURTNEY, Receiver, etc., Complainant,
vs.
FIDELITY & DEPOSIT COMPANY OF MARYLAND, Defendant. } No. 6654.

Bill of Exceptions.

For plaintiff: Hon. W. M. Smith.
For defendant: St. John Boyle and E. J. McDermott, Esq.

Be it remembered, that heretofore the above-entitled cause came on for trial on the first day of May, 1899, at a stated term of the United States circuit court for the district of Kentucky, before his honor Walter Evans, district judge, and the jury having been empaneled and sworn, the plaintiff introduced evidence conducing to prove the following facts, viz:

That Adolph Reutlinger had for many years been president and director of the German National Bank of Louisville, Ky., and that on the — day of April, 1894, Jacob M. McKnight was elected vice-president and manager thereof; and that the said Jacob M. McKnight, with the Fidelity & Deposit Co. of Maryland as surety, on the 1st day of June, 1894, executed and delivered to the said bank a bond for the faithful performance of his duties as such officer; that the said bond had been lost or mislaid, and could not be produced, but the said obligation was upon a printed form, and a copy of which, with the names and dates blank, but covering a period of one year from date, was produced and read in evidence, and which copy is as follows:

36 "Banks.

"*Bond No.* —.

"Fidelity and Deposit Company of Maryland; home office, Baltimore, Md.

"Amount, $—. Annual premium, $—.

"Know all men by these presents, that —— —— (hereinafter called the 'employee'), and the Fidelity and Deposit Company of Maryland (hereinafter called the 'company') are held and firmly bound unto —— —— (hereinafter called the 'employer') in the sum of — dollars, lawful money of the United States of America, to be paid to the said employer, his or their certain attorney, executors, administrators, assigns, or successors, to which payment well and truly to be made, we and each of us do bind ourselves, respectively, and our respective heirs, executors, administrators, and successors, jointly and severally, firmly by these presents.

"Sealed with our seals and dated the — day of ——, anno Domini one thousand eight hundred and ninety —.

"Whereas, the employee has been appointed in the service of the employer, and has been assigned to the office or position of — by the employer, and application has been made to the Fidelity and Deposit Company of Maryland for this bond;

"And, whereas, the said employer has delivered to the company a certain statement, and it being agreed and understood that such statement constitutes an essential part of the contract hereinafter expressed:

"Now, therefore, in consideration of the payment of the sum of — dollars, lawful money of the United States of America, to the company as a premium for the term commencing at the date hereof and ending on the — day of ——, eighteen hundred and ninety —, at 12 o'clock noon, the company does hereby agree that it will, within three months after receipt of proof satisfactory to its directors, and subject to the conditions hereinafter expressed, reimburse the employer to an amount not in excess of the penalty of this bond, for such pecuniary loss as the employer shall have sustained by any fraudulent act or acts committed by the employee during the continuance of this bond, in the performance of the duties of his said office or position, or of such other position as he may be subsequently appointed to or called upon to fill by the employer in said
37 service, 'of money, securities or other personal property belonging to the employer, or for which the employer is responsible.'

"This bond may be continued from year to year, at the option of the employer, at the same or an agreed premium rate, so long as the company shall consent to receive same, in which case the company shall remain liable for any dishonest act of the employee occurring between the original date of this bond and the time to which it shall have been continued.

"This bond is issued and continued upon and subject to the following conditions and provisions:

"That the actual payment of the premium and its acceptance by the company, for either the issue or continuance of this bond, is essential to its currency, and a condition precedent to a right to claim hereunder.

"That the employer shall immediately give the company notice in writing of the discovery of any default or loss hereunder, and shall file with the company his or their claim hereunder, with full particulars thereof, as soon as practicable thereafter, and no claim which shall not be so filed by the employer with the company within six months after the expiration or cancellation of this bond, or within six months after the employee shall have ceased to be in the employer's service, shall be payable hereunder.

"That if the employé leave the service of the employer during the currency of this bond, for any cause whatever, the bond shall there-on expire, and the company shall be notified in writing by the employer, and the amount of unearned premium shall be refundable to the employer on application, and no claim which shall not have been made on the company within six months after the employee leaves the service, during such currency, shall be valid or recoverable hereunder.

"That upon notification to the company of any loss hereunder, the company's liability shall thereupon terminate as regards any subsequent act of the employee.

"That the employer shall observe, or cause to be observed, due and customary supervision over the employee for the prevention of default; and if the employer shall at any time during the currency of this bond condone any act or default on the part of the employee which would give the employer the right to claim hereunder and shall continue *to* the employee in its service without written notification to the company, the company shall not be responsible hereunder for any default of the employee which may occur subsequent to such act, or default so condoned.

38 "That the employee shall not be required or permitted to perform permanently the duties of a dual capacity in the service of the employer which would admit of the possibility of fraud by false entries and absence of check by another officer.

"That there shall be a complete inspection of the accounts and books of the employee on behalf of the employer at least once in every twelve months from the date of this bond, such inspection to include examination of all cash and securities which the employee shall have custody or charge.

"That the employee has not, within the knowledge of the employer, been at any time in arrears or default in either this or other employment.

"That the employer shall at once notify the company on becoming aware of the employee being engaged in speculation or gambling, or indulging in any disreputable or unlawful habits or pursuits.

"That if the employer shall at any time hold concurrently with this bond any other bond or guarantee or security from or on behalf of the employee, the employer shall be entitled, in the event of loss by default of the employee, to claim hereunder only such proportion of the loss as the amount covered by this bond bears to the whole amount of security carried on the employee's behalf.

"That the company may, upon giving one month's notice in writing to the employer, cancel its responsibility hereunder, in so far as concerns the acts or defaults of the employee subsequent to the end of such month; in which event it will, upon request of the employer, refund the proportion of the premium paid for the unexpired term of this bond.

"That no suit or proceeding at law or in equity shall be brought to recover any claim under this bond unless the same shall have been commenced within twelve months (365 days) from the date of the first notification by the employer to the company of any loss hereunder.

"That it is essential to the validity of this bond that the employee's signature be hereunto subscribed and witnessed.

"That the employer shall at any time, upon the request and at the expense of the company, afford and render all information, evidence and assistance capable of being afforded by the employer, for the purpose of prosecuting and bringing to justice the employee for any criminal offence committed by him involving liability of the company hereunder, or for the purpose of enabling the com-
39 pany to procure reimbursement by the employee, or his estate, of any sum paid by, or recoverable from the company under this bond.

"And the employee doth hereby for himself, his heirs, executors, and administrators, covenant and agree to and with the company, that he will save, defend and keep harmless the company from and against all loss and damage of whatever nature or kind, and from all legal and other costs and expenses, direct or incidental, which the company shall or may at any time sustain, or be put to, for, by reason, or in consequence of the company having entered into this bond, whether before or after, any legal proceedings by or against it to recover hereunder, and without notice to him thereof. And in any suit or proceeding by the company to recover any sum of money from the employee, or from his estate, on account of any claim hereunder, the amount which the employer shall have claimed under this bond shall, until controverted by sufficient proof, be held to be the amount due by the employee to the company.

"And lastly, should the employee become a defaulter and seek refuge in any foreign country he hereby agrees to the enforcement against him of the laws of such country as they are now, or may be hereafter enacted, relative to the commission of injuries or offences against an employer resident in such country.

"In witness whereof the said —— —— (the employee) hath hereunto set his hand and seal, and the company has caused this

bond to be signed by its president and its —— —— and its seal to be hereunto affixed the day and year first above written.

—— ——, *Employee.*
—— ——, *President.*

"Signed, sealed and delivered by the said employee in presence of—

—— ——.
—— ——.

"Ex'd and ent'd — ——.

—— ——, *Secretary.*"

Evidence was further introduced conducing to prove that on the first day of January, 1895, the said Jacob M. McKnight was elected president in place of said Adolph Reutlinger, who became
40 the vice-president, and continued as such vice-president and as director till September 5, 1896. And afterwards the said bond was, on the first day of June, 1895, renewed, and the renewal was given therefor in words and figures as follows:

"No. 2360.

"Security department.

"Amount, $10,000.00. Premium, $40.00.

"Fidelity & Deposit Company of Maryland; home office, Baltimore, Md.

"In consideration of the sum of forty dollars, the Fidelity and Deposit Company of Maryland hereby guarantees the fidelity of Jacob McKnight, president, in the sum of ten thousand dollars, in favor of the German national bank, Louisville, Ky., from the first day of June, 1895, to the first day of June, 1896, subject to all the covenants and conditions set forth and expressed in the bond of this company, No. 5002, heretofore issued on the first day of June, 1894.

[SEAL.] "E. W. WARFIELD, *President.*
"THOS. L. BERRY,
"*Acting Secretary.*"

That afterwards, on June 1, 1896, it was renewed for another year by a receipt similar to the foregoing, with the exception of the dates.

There was testimony conducing to show that on March 11, 1895, Adolph Reutlinger, as vice-president of the German national bank, wrote a letter to Herman E. Bosler, the secretary and treasurer of the defendant, relative to the bond of the said McKnight, and counsel for defendant offered to read said letter as evidence to the jury, to which the complainant's counsel objected, and the court sustained said objection and refused to allow said letter to be read, to which defendant's counsel excepted. Said letter is in words and figures as follows:

"J. M. McKnight, president; Adolph Reutlinger, vice-president; R. E. Reutlinger, cashier.

"No. 2062.

"German national bank.

"LOUISVILLE, KY., *March* 11, 1895.

"Herman E. Bosler, sec'ty & treas., Fidelity & Deposit Company of Maryland, Baltimore, Md.

"DEAR SIR: In answer to your esteemed favor of the 5th
41 inst., beg to state that we were examined by U. S. examiners on October 20, 1894.

"We have about three examinations by the Government a year, and also have frequent periodical examinations.

"We also beg to notify you that our former vice-president and manager, Mr. J. M. McKnight, was, in January last, elected to the presidency of this bank, upon the resignation of the undersigned as such. As far as the management of the bank is concerned, Mr. McKnight's duties are now identically the same as they were when he was vice-president and manager.

"Will there be any change necessary in his bond? Kindly advise us, and oblige,

"Yours very respectfully,

"ADOLPH REUTLINGER, *Vice-Pres't.*

"Dictated."

And the plaintiff introduced further evidence, testifying that the complainant, R. H. Courtney, had been, on the 18th day of January, 1897, appointed receiver of the said German national bank by the comptroller of the Treasury, and as such, had taken possession of the assets of the said bank and assumed to perform the duties of such receiver on January 22nd, 1897. And the said R. H. Courtney, receiver, and the plaintiff herein, being introduced, testified that he had assumed such duties, and that he had notified the defendant, The Fidelity and Deposit Company of Maryland, as follows:

"My first notice to the Fidelity & Deposit Company as to the defalcation was less than a month after I became receiver—that is, on February 18th, 1897."

The witness was asked to produce the written notice. Counsel for defendant objected to the introduction of said notice, because it was not such a notice as the contract or bond required. The court overruled the objection of the defendant, and the defendant reserved exceptions to said ruling. Said written notice was read by the witness, and is as follows:

"J. M. McKnight, president; H. H. Rademaker, vice-president; E. E. Reutlinger, cashier.

German national bank.

LOUISVILLE, KY., *February* 18, 1897.

To the Fidelity & Deposit Company of Maryland, Baltimore, Md.

42 GENTLEMEN: Referring to the certificate No. 4043, issued from your security department, guaranteeing the fidelity of Jacob M. McKnight, president of the German national bank, under your bond to him, No. 5002, issued June 1st, 1894, in favor of such bank, we hereby notify you that said Jacob M. McKnight, as president, has been found in default to this bank, and that you will be required to make an indemnity to me as receiver, to the extent of said bond.

Yours truly, R. H. COURTNEY,
Receiver German National Bank."

Said witness further stated:

"At the time we gave that notice, we had examined far enough to know he was in default far beyond the amount of the bond. Proof of the claim was made on the third of July, 1897. It was sent to the company at Baltimore, and was lodged with its agent here. I had several conferences with Mr. Odiorne, an agent of the company here, and Mr. Mullen, his assistant, was also from time to time kept informed; not specifically, but he was informed sufficiently to know that a claim would be made, that there was ground for claim, and just ground, by conversation on the street; they were up there at the bank, at the office up there on First and Market, at various times, and on the street after the arrest of McKnight; it was a thing that was talked about almost whenever there was a meeting." This question was asked the witness: "Was there any statement made to you by Mr. Mullen as to the notice and proof of claim, as to whether or not he would require any more specific notice?"

Objected to by counsel for the defendant. Objection overruled. Exceptions by the counsel for the defendant.

Witness answered as follows: "No, sir." Said witness also stated that these defalcations were not known to him until after he began the investigation under the experts of the comptroller, and he continued to find them out as examination progressed, and that McKnight was not arrested for any of these acts as far as he had heard. He said: "Almost immediately after the bank passed into my hands as receiver I began to ascertain the defalcations. The experts, Mr. Hays, a Government expert, and Mr. Escott, a national-bank examiner, were at work immediately after Mr. McKnight's arrest. I kept pace with their investigation. It was almost immediately after the bank closed that these defalcations became known, not all of them, but enough to ground the claim upon." I had that
43 notice of February 18th, 1897, mailed to the office at Baltimore. It is my impression that I mailed a like notice to the agent here.

The experts began examining the books of the bank almost immediately after it was closed on the 18th of January, 1897. The comptroller had it examined by Mr. Escott before he appointed a receiver—that is, about a week before it was closed Mr. Escott was at work in the examination, that is my recollection—about a week before. Col. Boyle, attorney for defendant, stated in the court in the presence of the jury as follows: "We have no doubt he sent it (the notice), and make no point on that, but we desire to object to the admission of it, as not being the notice required in the contract, and therefore we received no notice whatever." The court then overruled said objection and admitted said notice, to which defendant excepted.

Mr. James Escott testified in substance that he was a national bank examiner in 1897, and had been for nearly four years, and that he made several examinations of this bank for the Government during that period, 1894, 1895 and 1896, two examinations each year, and said: "I think the bank was closed on the 21st of January, 1897, or the 18th—I am not sure which. There was nearly a week between the closing of the bank and the appointment of the receiver—about a week. Mr. McKnight was arrested the following day after the closing of the bank. We began to get these shortages about two or three weeks after the bank was closed. They were discovered from time to time. I began to discover them in two weeks."

There was further evidence introduced by the plaintiff conducing to prove that one S. E. Edmunds, on Jan. 18, 1896, received from the German national bank $1,000 in money, and for which, at the instance of McKnight, he gave his individual check on that bank; that the cashier and teller (being the one person) carried this check as cash until March 12, 1896, at the request of McKnight, on which day it was charged to the account of S. E. Edmunds & Company, by order of the president, J. M. McKnight, and that the said $1,000 was used by the said Edmunds for the purpose of aiding in the election of the said McKnight as mayor of Louisville in the following manner:

About Jan. 14, 1896, Henry S. Tyler, then mayor of the city of Louisville, died, and the said J. M. McKnight became a candidate for the vacant position, and which position was to be filled by the general council of the city of Louisville. The said general council was composed of twelve aldermen and twenty-four council-
44 men, and among the members were men named Jenne, Sowders, Glover and Adams; that said four members demanded the payment of $1,000 for their use and benefit before they would agree to vote for McKnight, and that said Edmunds so informed McKnight, who directed the cashier and teller to take $1,000 to another bank and get for Edmunds ten bills of $100 each, which he did, and delivered the said ten bills to the said Edmunds, who took the same and distributed among the four members as follows: $400 to Jenne, $200 to Adams, $200 to Sowders, and $200 to Glover, and in consideration thereof each one signed the following agreement:

"I hereby pledge myself to vote for J. M. McKnight for mayor of the city of Louisville, first, last and all the time, until elected or defeated before the general council." There was testimony conducing to show that said vice-president, Adolph Reutlinger, heard said McKnight tell the cashier to go out and get said ten bills of $100.00 each for said Edmunds; that said Edmunds was a prominent factor of said McKnight's race for mayor, and was frequently in the bank during that time; that there were frequent meetings at the bank of persons interested in his candidacy; that during that time Edmunds was frequently seen in conversation with Adolph and Rudolph Reutlinger. The said Edmunds had no individual account in the bank then, but S. E. Edmunds & Co. had an account there, but it does not appear how it stood at the time he gave the check and received the money; but he testified that he understood that the check was to be taken care of by McKnight.

There was also evidence introduced by the plaintiff conducing to prove that the said McKnight was defeated in his contest for mayor, and that Geo. D. Todd, Esq., was elected, and that afterwards there was great dissension between the said Todd and the boards of aldermen and councilmen, and that a majority of the board of aldermen—seven in number—were opposed to the mayor and determined to block legislation proposed by him. Mayor Todd, however, began to make inroads on the opposition to him, and while five of the seven members were working in harmony with him, there were two—Messrs. Britt and Reeder—who were considered wavering, and efforts were made to get them to unite with the five; that said S. E. Edmunds acted as a go-between in the negotiation with them, and that the said McKnight drew up a paper, intended to be signed by the seven aldermen, pledging themselves to stand together in their contest against the mayor, but Britt and Reeder refused to sign the paper unless each of them received $1,000; that said Edmunds informed McKnight of this fact, and that thereupon the said McKnight requested R. E. Reutlinger, the cashier and teller, to remain at the bank and keep the vault open after the regular time for closing; that McKnight then told the said cashier "that he (McKnight) had a big scheme on hand and that it was a big thing; but did not further explain it; that said McKnight caused said Britt and Reeder to be brought to the bank by said Edmunds at or about 6.30 p. m. on February 6, 1896; that said Edmunds, in the presence of said cashier and said Britt and Reeder, prepared the note hereinafter given, and said Britt and Reeder signed it, and then they went upstairs and signed the agreement hereinafter given, and then they returned to the bank office, and the cashier then handed Britt the two thousand dollars in currency by direction of McKnight. Said note reads as follows:

"$2,000.00. LOUISVILLE, KY., *Feb.* 6, 1896.

"One year after date we promise to pay to the order of ourselves two thousand dollars without defalcation, value received, negotiable and payable at German national bank.

F. A. BRITT.
JOHN W. REEDER."

"Indorsed: F. A. Britt, John W. Reeder. Protested for non-payment Feb. 9, 1897. Edw. A. Newhouse, N. P., J. C."

The testimony also conduced to show that while in the said bank building, the said Edmunds asked the said Britt and Reeder to lend him $150 apiece of this money, and that Britt thereupon loaned him $150, but Reeder would not let him have more than $75, and that in this way the said Edmunds got $225 of the money. The agreement signed by Britt and Reeder and five other aldermen is as follows:

"LOUISVILLE, KY., *February 5th*, 1896.

"We do this day and date agree with one another, and bind ourselves on our sacred words and honor, that we will stand together on any and all propositions of legislation that may come before the body of which we are members, namely, the board of aldermen of the city of Louisville; that we will so caucus with our friend
46 J. M. McKnight, and act wisely, and secure for our friends an equal division of the offices and any profit that may arise therefrom; that we, as men and members of the upper board, will not allow the mayor to force upon us any appointments that we do not deem wise and to our interest, and in so doing will not act the first night of a meeting on any proposition sent in by the mayor, but will take one week for consideration and caucus.

"Now we have calmly considered the above, and do again pledge ourselves one to the other before subscribing our names this day and date, Feb. 5th, 1896, in the presence of one and the other.

C. J. JENNE.
J. E. LEATHERMAN.
R. E. KING.
R. O. BREUNER.
J. D. TRICK.
F. A. BRITT.
JOHN W. REEDER."

The contest for mayor and the subsequent controversies were matters of general notoriety, and were discussed in the newspapers, and the said Edmunds was frequently in the bank conferring with McKnight upon these subjects, and was often seen by and had conversations with the vice-president and director and the other officers of the bank, who knew of the purposes of his visits.

And there was further evidence introduced by the plaintiff, conducing to prove that the cashier and teller, who was the son of the vice-president, notified him of the fact that the bank had been kept open, and that the $2,000 had been paid to Britt and Reeder and the note taken; that he notified him of that at his house that evening about 9.30 p. m., and that the next morning the vice-president, Adolph Reutlinger, asked McKnight for an explanation of the matter. McKnight responded that the transaction was all right and that the note was good, and that it would be guaranteed by men of credit, whom he named. The said Adolph Reutlinger was not, however, satisfied, and notified other members of the board of directors,

and shortly afterwards brought the matter before the board for its consideration; whereupon McKnight made the same explanation that he had before, and it seemed to satisfy the board.

There was testimony conducing to show that the morning after the Britt and Reeder transaction the said Adolph Reutlinger, the vice-president, approached McKnight about the said matter, and that McKnight had a long, yellow envelope in his hand, and he told the said vice-president that "those fellows had signed it and that he would not sign that for the city of Louisville;" that "he had a document there in his pocket which was signed by those fellows;" that "he had a meeting upstairs and that paper was signed,
47 and he would not sign it for the city of Louisville;" that McKnight did not mention the names of the persons who had signed it, but this conversation was had with him by the vice-president when the Britt and Reeder matter was being discussed.

There was also testimony conducing to show that Adolph Reutlinger, the vice-president, noticed that the bank was to get no interest whatever on the loan to Britt and Reeder for a year; the vice-president knew that this was an unusual and queer bank transaction, and that there was no promise by McKnight to pay that interest, and no explanation made to him or to the board of directors about the interest feature of the transaction; that said Adolph Reutlinger had been a bank officer for many years; that he had been an officer of the German national bank since 1872; that the feeling between Adolph Reutlinger, the vice-president, and McKnight was not friendly during the year 1896; that during all that time Adolph Reutlinger was drawing a salary of $1,500.00 as vice-president, and he was custodian of the bank's cash reserve of many thousand of dollars, and he had the money in a box to which he alone had the combination.

Other testimony was offered conducing to prove that McKnight drew his check for other sums of money which were applied to the payment of his private indebtedness, and which sums were charged to different accounts; that on Jan. 21, 1896, the said McKnight drew his check upon the German national bank for $1,253.00 in payment of a claim in the hands of M. and D. Sachs, attorneys-at-law, against him; and that on March 12, 1896, he drew a similar check for $1,650.00, which checks were paid by the bank and were carried by the cashier and teller as cash items until March 12, 1896, by direction of McKnight, when they were charged—the former to S. E. Edmunds & Co., and the latter to an account called the "Louisville deposit collateral account," and that this was done by the bookkeeper by the order either of McKnight or of Mr. Reutlinger, the cashier and teller; that the said vice-president saw that check of McKnight to Sachs for $1,253.00 on the file of the cashier, and that it was being held up by the cashier as a cash item, and that the said vice-president asked the cashier and teller why he was doing that, and that said cashier said he was doing it at the request of McKnight; that it was the custom of the cashier to tell his father, the vice-president, all that went on at the bank, and he told his father when McKnight was overdrawn and whenever he discounted a note

for him, and the said cashier and teller testified that he
48 carried the checks as cash items by the direction of McKnight, and never gave any instructions to any one as to what accounts to charge them to.

The account known as the Louisville deposit collateral account represented money that belonged to the Germania Safety Vault and Trust Company, as assignee of the insolvent Louisville deposit bank.

And there was further evidence introduced by the plaintiff conducing to prove that on June 6, 1896, J. M. McKnight drew upon the German national bank for $3,736.60, in payment to Mr. H. F. Embry for a private debt due from McKnight to Embry, and the said sum was, by order of McKnight, charged on the books to E. G. Williams, special; that the said E. G. Williams was a broker in whiskey, and was employed by the bank to sell whiskey owned by it, and in which the said McKnight had no personal interest.

There was also testimony conducing to show that in November, 1896, S. E. Edmunds and Company, a firm composed of S. E. Edmunds and said J. M. McKnight, were indebted to the German national bank on a note for $7,127.94; that warehouse receipts for tobacco owned by the said firm were pledged with said bank to secure said note; that at the request of said McKnight said note of S. E. Edmunds & Company was surrendered and canceled, and two new notes were executed by S. E. Edmunds, one for $2,127.94 and the other for $5,000.00; that said collateral was afterwards sold by R. H. Courtney, receiver, and that he received in payment for it $5,062.22, leaving a balance due of $2,627.94 on said two notes; that said Edmunds thought at the time of the sale and at the time of the execution of said notes and at the time of the trial herein that said tobacco was worth the full amount of said notes and ought to have brought said sum and would have brought said sum if sold by himself or some other expert tobacco salesman or broker.

But the testimony of R. H. Courtney also conduced to prove that he handled said tobacco as well as he could, and that, in his opinion, it brought on the market all it was worth.

Evidence was also introduced conducing to prove that on January 4, 1897, the German national bank paid $379.96 to the Union national bank through the clearing-house on a check of J. M. McKnight to Mr. H. F. Embry, in payment of a private debt of said J. M. McKnight; that said check was charged by the order of said McKnight or said cashier and teller, to E. G. Williams, special;
49 that the $45.00 cash item set out in the petition was entered in the books of the cashier and teller Jan. 12, 1896; that two cash items of $25.00 each were entered April 25, 1896; that the one for $76.00 was entered May 21, 1896; that the one for $47.15 was entered on May 21, 1896; the one for $10.00 and the one for $15.00 were entered on the same day; that these entries were simply memoranda in the book of the cashier and teller, and indicated that checks had been cashed for McKnight by the teller, and the said items were thus carried in the cash items until the bank closed.

JOHN KERWIN, having been introduced by plaintiff, testified substantially that he was the individual book-keeper of the German national bank; that he had made the entries of the books under the instructions either from the cashier, Mr. Rudolph E. Reutlinger, or from Mr. J. M. McKnight, the president—that first one and then the other would give him instructions how to make these entries; that he could not state at the trial whether he got the orders as to any particular matter from the cashier or from McKnight; that McKnight's check for $1,253.00 to Attorney Sachs on January 21, 1896, which was paid through the clearing-house the next day, was kept by the cashier and teller in his cash as a cash item until March 12, 1896, and was under the control and custody of the cashier during all that time; that the witness entered this check for $1,253.00 as soon as he received it from the cashier; that other employés in the bank, and the vice-president and director, Mr. Adolph Reutlinger, the father of the cashier and teller, also now and then helped the cashier and teller in straightening out his cash matters, and in that way now and then learned what checks were held back in the cash items; that all of the other checks given by McKnight and complained of herein were entered as they were paid by the bank; that the note executed by Britt and Reeder to the German national bank for $2,000.00 was dated on February 6, 1896, and the money was gotten that day, but it was entered on the books on February 10, 1896, with the other discounted notes due to the bank, and in regular order, and open to the inspection of the officers of the bank or any director who wanted to examine the books or see what assets the bank had. Said John Kerwin, the individual book-keeper, was asked this question: "Was that ledger $3,000 out of balance during all the time you were there, or longer?" The court refused to permit the witness to answer this question. The defendant, by counsel, thereupon avowed that, if permitted to answer the question, the witness would answer truly that from the time McKnight came to the bank—from the time McKnight was elected vice-president and manager until the bank was closed by the comptroller—the books were irregular and out of balance, and they were out of balance not less than $3,000 during the whole time he was an officer in that bank, and this was reported to the officers of the bank other than McKnight, by the national bank examiner, who went over the books, and all the directors knew that it remained in that condition. The court still refused to allow witness to answer the question, and to the ruling of the court the defendant by counsel, excepted.

There was further testimony conducing to prove that Mr. Adolph Reutlinger was president of the German national bank in June, 1894, and up to Jan. 1, 1895, when Mr. McKnight was elected president; that Mr. Adolph Reutlinger from Jan. 1, 1895, until September 5, 1896, was vice-president and a director of the bank, and was an officer of the Germania Safety Vault and Trust Company, which occupied the building adjoining that of the German national bank, with a door in the wall between them; that Adolph Reutlinger, the vice-president and director, had his desk in the banking-room of the

German national bank, and used said desk daily during business hours; that Adolph Reutlinger sometimes acted as cashier and teller for his son, Rudolph Reutlinger, while Mr. McKnight was president and in the summer of 1896 and prior thereto; that Adolph Ruetlinger was familiar with the management of the German national bank during all the time Mr. McKnight was there; that Adolph Reutlinger frequently examined the books of the bank and kept the run of the bank, and looked to see what notes were discounted by the bank, and what overdrafts existed; that McKnight was overdrawn in large sums of money from July, 1895, up to fifteen days before the bank closed; that his overdrafts were frequently as high as $1,200.00; that he was overdrawn nearly every day during that period. That Mr. Adolph Reutlinger, the vice-president and director, knew this—that the other directors knew of these overdrafts as well as the cashier and teller; that the vice-president and director saw the trial balance every month—that it was left there for his and his son's inspection, though the witness could not positively say they did see it. The overdrafts of the said McKnight were offered in evidence by the attorney for the plaintiff, and it appeared therefrom that the said McKnight was overdrawn in his accounts from the time he became employed by the bank to the time of the appointment of the receiver, with the exception of occasional periods.

51 And afterwards the plaintiff introduced as a witness JACOB REISCH, who, having been duly sworn, testified as follows:

(Direct examination by Mr. SMITH:)

Q. Were you a director in this bank?
A. I was.
Q. How long?
A. A year.
Q. In 1896?
A. 1896.
Q. Did you know of a check dated June 8, 1896, drawn by Mr. McKnight on the German national bank, in favor of the Union national bank, for $3,736.60, as being paid by your bank?
A. I did not know anything about it.
Q. Did you know anything of a like check for $379.96 being paid as of Jan. 4, 1897?
A. No, sir.
Q. Did you know anything of two checks, one of $1,650 and the other for $1,253, each being payable to M. A., D. A. and J. G. Sachs, one dated March 12, 1896, and the other dated January 20, 1896, being paid by your bank?
A. No, sir.
Q. Did you know anything of a check of $1,000, drawn by S. E. Edmunds on your bank, dated Jan. 18, 1896?
A. No, sir; I never heard of any of them.
Q. Did you know anything of a note of Britt and Reeder being

discounted at your bank, the note being for $2,000, on the 6th of February, 1896?

A. No, sir; I did not know anything about it.

Q. Did not know of any of those papers?

A. No, sir.

Q. Did you ever learn of those papers or any of them before you became a witness in this case?

A. No, sir; I just heard about it, about that Reeder note, about two days after, that Reeder went up that night in the bank and got $2,000 out, but that was about two or three days after that happened.

Q. About two or three days after the Britt and Reeder note was executed, you heard of it?

A. Yes, sir.

Q. What did you hear in regard to it?

A. Old man Reutlinger told me, he said the bank was open about six o'clock that night, and Britt and Reeder, and the whole gang there, he gave a note and got $2,000 out of the bank.

Q. Got some money out of the bank?

52 A. Yes, sir.

Q. Did you learn what it was for?

A. No; he did not state what it was for.

Q. Did you ever learn what it was for?

A. No, sir; I just heard after that it was for the council race, the Todd race, something like that.

Q. Was it after or before the bank was closed you heard about the Todd race?

A. I heard that three days after the money was out of the bank.

Q. What was it you heard in three days after the money was out of the bank?

A. That the bank was open after six o'clock, and they got $2,000 out of the bank.

Q. Now, when was it you heard that that money was intended in connection with the Todd race?

A. At the same time, old man Reutlinger told me that the same time.

Q. Told you what?

A. Old man Reutlinger told me that.

Q. Told you what?

A. That the money was used for the mayor's race for the Todd race.

Q. That it was money used in that race?

A. Yes, sir.

Q. Are you certain Mr. Reutlinger told you that?

A. He told me, not in the directors' meeting, he told me that outside.

Q. Were you not in the directors' meeting when that note was considered?

A. Yes, sir; I believe that note did come up, and McKnight said if Reeder did not pay it he would.

Q. Did McKnight say whether or not Britt and Reeder were good?

A. Yes, sir; they said they were good.

Q. Said Britt and Reeder were good?

A. Yes, sir; and I believe he said Mr. Gaulbert would go on the note, is on the note, or went on it, didn't exactly say he was on it, he said he went on it.

Q. Did he say anything about Mr. Whallen?

A. No, he never mentioned anything about Whallen.

Q. You don't remember?

A. I don't remember that.

Q. He said Britt and Reeder were good?

Objected to by counsel for defendant as leading, and the question was not answered.

Counsel for defendant declined to cross-examine.

53 And there was other testimony conducing to prove that the management of the German national bank by its directors was careless or negligent, and that they did not observe, or cause to be observed, due and customary supervision over the employees for the prevention of default; and there was evidence conducing to prove that there had not been a complete or customary inspection of the books of the said McKnight on behalf of the said bank once in every twelve months during the continuance of the bond, and that there was no examination of any cash or discounted paper or securities in the custody or under the control of the said McKnight.

And thereupon the defendant offered in evidence a letter signed by R. E. Reutlinger, cashier, and addressed to the defendant, The Fidelity & Deposit Company of Maryland, as follows:

"Security department. No. 5002. Bond division.

Fidelity and Deposit Company of Maryland.

Home office, Baltimore, Maryland.

BALTIMORE, *May* 15, 1896.

To German nat'l bank, Louisville, Ky.

DEAR SIR: We hereby notify you that bond No. 5002 for $10,000, issued by this company on behalf of Jacob M. McKnight, in your employ as president, will expire on the 1st day of June next.

The premium, $40.00, should be paid on or before the date of expiration, otherwise the bond will lapse. Kindly have the certificate below filled in and signed, and forward with remittance for premium to Jos. S. Odiorne, gen'l agent, when the renewal receipt will be sent to you.

Yours respectfully, EDWIN WARFIELD, *President.*"

"To Fidelity and Deposit Company of Maryland:

This is to certify, that on the — day of ——, 189–, the books and accounts of Mr. J. M. McKnight, *is* president, in our employ, *as*—

has no books and accounts—were examined by us, and we found them correct in every respect and all moneys handled by him accounted for.

54 "He has performed his duties in an acceptable and satisfactory manner, and we know of no reason why the guarantee bond should not be continued.

His salary is now $4,500.00, and he is employed as president.

Signature, R. E. REUTLINGER,
Cash., Employer.

Dated at Louisville, Ky., May 29, 1896.
To employer—notice of expiration."

And it not appearing that there had been special authority from the board of directors of the said bank, authorizing or directing the said cashier to write such communication, and the court being of opinion that the cashier had no such power by reason of his office, the same was not binding upon the said bank, and excluded the same as evidence; to which the defendant excepted at the time and still excepts. After the court had refused the defendant permission to read to the jury the letter signed by the cashier and addressed by him to the defendant, and dated May 29, 1896, and relative to the renewal of the said McKnight's bond, the counsel for the defendant asked the cashier the following questions:

"I would like to ask the witness this question: Did not the bank pay for the bond of the president?"

A. "I could not answer that; I don't know it."

Q. "Did not the bank pay for your bond as cashier?"

A. "I think they did; yes, sir."

Q. "Were not all these bond matters discussed by the board of directors and the party that was to give bond, and was not the party that was to give bond selected by the board of directors?"

Objected to by counsel for plaintiff; objection sustained; to which the defendant excepted. Then counsel for the defendant asked the witness this question:

"Did you not know why you were signing any paper of this sort at all?"

A. "Yes, sir; I knew when that letter came, I knew it, yes, sir; not before that, though."

Q. "You knew the bond had to be renewed then, and you wrote the letter to the company on that account?"

A. "I signed that paper, yes, sir."

Objected to by counsel for plaintiff because the paper had been excluded and is immaterial.

By the COURT: "Yes, that is an improper question."

To which ruling of the court the defendant excepted.

55 There was also evidence tending to show that J. M. McKnight was president of the bank, and the other officers of the bank, including the directory, had entire confidence in his honesty and integrity up to the time the bank was closed; that none of

them had any knowledge that any act of his, in the management of said bank, was fraudulent or dishonest, until after the closing of the bank; that said bank had a discount committee who regularly examined and passed on the papers of the bank, as required of such committee, and the directory of said bank undertook to make a monthly investigation, sometimes twice a month, of the affairs of said bank, and required the president to go through same with them and make a full report thereon; that some of the directors were in the bank almost daily inspecting its affairs, and that they did at all times observe due and customary supervision over said president for the prevention of default; that none of the officers of said bank, including the directory, had any knowledge of the various checks set up in the petition as fraudulent, and that were charged to the account of other parties than those drawing them, or on whom they were drawn, except the clerks who charged them up to said account as stated, and there was evidence tending to show that they charged them up to such accounts by the direction of McKnight, the president, and except, further, R. E. Reutlinger, the cashier and teller of said bank, knew of said checks when they came into said bank and was instructed to hold them as cash items by McKnight, but further than this he had no knowledge of them.

As to the $2,000, Britt and Reeder note, there was also evidence tending to show that R. E. Reutlinger was required to stay at the bank until after banking hours, and was directed by McKnight to, and did lay out the $2,000 on said note to said parties, but that further than this he had no knowledge thereof.

There was also evidence tending further to show that said R. E. Reutlinger informed his father, Adolph Reutlinger, vice-president, of the payment of this $2,000 that night, and that said Adolph Reutlinger made inquiry of McKnight to explain the transaction. That thereupon McKnight told him that said parties were good and solvent, and the note was regularly discounted and all right, and that if required, Gaulbert or Whallen would sign same with them, and that he, McKnight, would guarantee the payment thereof; that the parties were obliged to have the money that night, and he so kept the bank open to let them have it.

56 There was evidence tending further to show that said Adolph Reutlinger then went before the directory and told them what McKnight had said in regard to this note, and said to them that he had made some investigation and could not find that these parties had any property; that he was unable to say whether or not they were good, and that thereupon McKnight came before said directory and made the same statement to them that he had made to Adolph Reutlinger, assuring them that the note was good, and that said directors believed and relied on his statement, and so passed the note; that there was no other evidence tending to show any further knowledge of said note, or its true character, by the other officers or any of the directors of the bank than is herein stated, except in the testimony of Jacob Reisch, one of the directors, that some short time after the execution of said note Adolph Reutlinger told him what he had learned thereof as herein stated, and fur-

ther he says that said Reutlinger told him then that the money was used in the mayor's race. This latter statement Adolph Reutlinger denied in his evidence.

There was also evidence tending to show, by the minutes of the directors of the bank, that the books were out of balance to the extent of $3,100, but that before the said bank was closed these discrepancies were discovered to be only clerical mistakes, and that they were corrected, bringing the books in balance.

And here the plaintiff rested.

And the defendant thereupon offered in evidence a copy of a petition filed by the plaintiff as receiver of the German national bank against Jacob M. McKnight and others on March 6, 1897, in the Jefferson circuit court, held in Louisville, Jefferson county, Kentucky, and which is in words and figures as follows:

"Jefferson Circuit Court.

"R. H. COURTNEY, Receiver of the German National Bank, Plaintiff,
vs.
"JACOB M. MCKNIGHT and CARL MCKNIGHT, Defendants.

"Petition Ordinary.

"The plaintiff, R. H. Courtney, states that the German national bank, an association created and existing under and by
57 virtue of the laws of the United States, and doing business in the city of Louisville, in the State of Kentucky, was on the 18th day of January, 1897, closed by orders of the bank examiner of the United States, and thereafter, on the 22nd day of January, 1897, the Comptroller of the Currency of the United States, having become satisfied that said German national bank was insolvent, appointed plaintiff receiver of said bank, to take possession of its assets, and to wind up its affairs as provided by the laws of the United States in such cases made and provided.

"The plaintiff says that he has qualified as such receiver and is now engaged in the performance of his duties as such.

"Plaintiff says that the German national bank as an association, created under the national banking act of the United States, had power to contract and be contracted with, sue and be sued, and do all other acts incident to its corporate existence.

"Plaintiff says that on March 19, 1895, the defendant Jacob M. McKnight executed and delivered his certain promissory note to the German national bank, in and by which he agreed and promised to pay on demand the sum of one thousand dollars, with interest from date until paid. Plaintiff says that demand has been made for the payment of said note, but no part thereof has been paid, and the whole is now due and unpaid, together with interest from March 19th, 1895.

"Plaintiff files said note herewith as part hereof, marked Exhibit 'A.'

"2. Plaintiff further says that on March 16, 1896, the defendant Jacob M. McKnight executed and delivered his certain other promissory note to the German national bank, in and by which he agreed and promised to pay to said bank sixty days after said date, the sum of three hundred dollars, with interest from the maturity thereof, July 18, 1896, at the rate of six per cent. per annum until paid.

"Plaintiff says that the principal and interest of said note is now due, and the said note is filed herewith as part hereof marked Exhibit 'B'

"3. Plaintiff further says that on Jan. 21st, 1896, the defendant Jacob M. McKnight appropriated and wrongfully took from the funds of said bank for his own use, the sum of $2,253, and plaintiff says that by said conversion the defendant Jacob M. McKnight became indebted to plaintiff for money had and received to plaintiff's use in the sum of $2,253, with interest from January 21st, 1896.

58 "4. Plaintiff further says that on June 8, 1896, the defendant Jacob M. McKnight appropriated and wrongfully took from the funds of said bank for his own use, the sum of $3,736.60, and plaintiff says that by said conversion, the defendant Jacob M. McKnight became indebted to plaintiff for money had and received to plaintiff's use in the sum of $3,736.60, with interest from June 8th, 1896.

"Plaintiff says that the defendant Jacob M. McKnight, being indebted to the German national bank as stated, did, subsequent to the creation of said indebtedness, with the intent to fraudulently cheat, hinder and delay his creditors, convey to the defendant Carl McKnight, by deed dated February 17, 1897, the following-described property, in Jefferson county, Kentucky, with the improvements thereon, to wit:

"Lying and being on the south side of the Shelbyville Branch turnpike road, about one-half mile east of Beargrass creek, and bounded as follows: Beginning in the center line of said turnpike road, at Birchler's western corner, thence running with Birchler's western line south 37½ degrees east 73 poles to a point near a branch; thence south 52½ degrees west 2 poles to a stake; thence north 37½ degrees west $20\frac{7}{10}$ poles; thence south 52½ degrees west 23½ poles to the eastern line of Bull's tract; thence with Bull's eastern line north 52½ degrees west $69\frac{8}{10}$ poles to the center line of the turnpike; thence with the said center line, north 87 degrees east 31 poles to the point of beginning; and being the same property conveyed to J. McKnight by Henry F. Embry and wife, by deed dated June 7th, 1895, and recorded in Deed Book 453, page 128, Jefferson county court clerk's office.

"Plaintiff makes Carl McKnight a party defendant hereto, and calls upon him to set up his claim herein to said property or be forever barred.

"Plaintiff says that the nature of the claim of the German national bank against the defendant Jacob M. McKnight is for promissory notes executed by him to said bank as set forth herein, and for money had and received to plaintiff's use and benefit; that the

same is just and the plaintiff believes he ought to recover the sum of $1,000.00, with interest from March 19, 1895, and the further sum of $300.00, with interest from July 18, 1896, and the further sum of $2,253.00, with interest from Jan. 21st, 1896, and the further sum of $3,736.60, with interest from June 8, 1896.

" Plaintiff says that said money which he seeks to recover
59 is now due and unpaid, and that the defendant has no property in this State subject to execution, or not enough thereof to satisfy plaintiff's demand, and the collection of the demand will be endangered by delay in obtaining judgment or a return of no property found; and that the defendant Jacob McKnight has sold, conveyed or otherwise disposed of his property, or suffered or permitted it to be sold with fraudulent intent to cheat, hinder and delay his creditors.

" Wherefore, plaintiff prays for judgment against the said defendant Jacob M. McKnight in the sum of $1,000.00, with interest from March 19th, 1895; and the further sum of $300.00, with interest from July 18, 1896; and the further sum of $300.00, with interest from July 18, 1896; and the further sum of $2,253.00, with interest from Jan. 21st, 1896; and the further sum of $3,736.60, with interest from June 8, 1896, until paid; for a general attachment herein, for its costs herein expended, and for all proper and general relief.

" GIBSON AND MARSHALL,
" Att'ys for Pl'ff.

" R. H. Courtney says he is receiver of the German national bank, and the foregoing statements are true as he verily believes.

R. H. COURTNEY.

" Subscribed and sworn to before me by R. H. Courtney this the 6th day of March, 1897.

WILLIAM T. HALE, *N. P., J. C.*

" Commission expires Jan. 13, 1900."

On said petition a summons and an attachment were duly issued by the clerk of said court, and they were duly executed—the former on said McKnight, and the latter on property to which it was claimed he had title.

After the court delivered its charge to the jury and before the jury retired and in the presence of the jury the defendant by its counsel presented certain objections to certain portions of the said charge as follows:

First. The court in its charge said:

"Before, however, going into that (the grounds of defense to the action), I should have said, if I have not, that the action that was brought in the Jefferson circuit court some time in March, 1897, for the recovery of certain debts, should be given no effect in your de-
liberations in this case. That was a suit not upon this in-
60 debtedness, except in respect to one particular item, that of $3,736.60, but was a suit upon other indebtedness. It is a suit in several paragraphs, one of which is upon notes and obliga-

tions executed by McKnight to the bank, but the only one of the items mentioned in this suit that is contained in the suit in the State court is that of $3,736, which represents money that had been paid through the Union national bank upon the debt of one Embry. I need not go into any reasons with you upon that subject, but that court is clearly of the opinion that no importance should be attached to that suit, or any of its affirmations in your deliberations in this case."

Counsel for defendant objected and excepted to the foregoing portion of the charge.

Second. The court in its charge, among other things, said:

"The defendant insists upon this clause of the contract between it and the bank, namely, that the 'employer shall immediately give the company notice in writing of the discovery of any default or loss hereunder, and shall file its or their claims hereunder, with full particulars thereof, as soon as practicable thereafter, and no claim which shall not be so filed by the employer with the company within six months after the expiration or cancellation of its bond, or within six months after the employé shall have ceased to be in the employer's service, shall be payable hereunder.' In considering that clause of the contract between the parties I do not think the word 'immediate' should be given such construction as that it would mean instantly, but I believe it conforms with the views of the supreme court and the authorities generally to tell you that it means that it was the duty of the plaintiff in this case to give, as soon as reasonably practicable and with promptness, notice of the discovery of any default.

"It did not mean that as soon as one was suspected that notice should be given; but if you believe from the evidence that within a reasonable time after the receiver in this case, and you must remember that he is the receiver merely and knew nothing about the management of this bank, nothing of its affairs, until he was appointed, if you believe that within a reasonable time after he discovered, actually discovered a default, he gave the notice of the 18th day of February, 1897, you are at liberty to infer that that part of the obligation of this bond has been performed."

Counsel for defendant objected to this portion of the charge
61 because the notice of February 18th was not such notice as was required by the contract, and that the instruction was therefore erroneous and misleading; but the court overruled the objection, and allowed the charge to stand, to which the defendant at the time excepted, and still excepts.

Third. In delivering the charge to the jury, the court says:

"It (the bond) also requires that the insured, that is to say, the bank, shall file with the company his or their claim thereunder, with full particulars thereof, as soon as practicable. Now, I do not believe that that means that the particulars shall be filed until they are known. In this case the evidence, I think, will justify you in the conclusion that this claim was made as soon as particulars of this kind were known. One of the important reasons why this suit that was filed in the State court was not regarded as important evi-

dence in this case was that it does not show anything concerning the particulars of this debt, nor does it show that the plaintiff had known the particulars before this suit was filed. I think you will be justified in concluding from the evidence that with reasonable promptness, after the particulars of this claim were ascertained by the plaintiff, this claim was made in such detail that no fault has been found with it, so far as has appeared."

The defendant, by counsel, objected to the foregoing portion of the charge, because there was no sufficient evidence that would justify the jury in finding that the particulars were filed within a reasonable time; and because it appeared from the suit in the State court mentioned in the charge, that the receiver in this case had knowledge of that particular default of $3,736, and that the court, therefore, should have instructed the jury to the contrary of what was contained in the charge. But the court overruled the objection, and allowed the charge to stand, to which the defendant at this time excepted, and still excepts.

Fourth. The court in its charge further said:

"There is another clause in the bond which reads in this way:

"'That there shall be complete inspection of the accounts and books of the employé, on behalf of the employer, at least once in every twelve months from the date of this bond; such inspection shall include an examination of all cash and securities of which the employé shall have custody or charge.'

"Now, gentlemen, the evidence on that subject has not been
62 full. It is for you to determine whether there was that inspection, that complete inspection of the accounts and books of the employé on behalf of the employer, within at least every twelve months, and whether it included an examination of the cash and securities which the employé shall have personally in charge. This would be a much more important consideration if the president of the bank instead of the cashier had charge of the securities or cash of the bank. The president, I tell you as a matter of law, does not have charge of the cash or securities of a bank, so that the president is probably but little concerned with this particular clause of this contract."

To which portion of said charge the defendant objected. But the court overruled the objection and allowed the charge to stand, to which the defendant then excepted, and still excepts.

Fifth. And the court further said in its charge to the jury:

"The last clause to which I will call your attention reads this way:

"'That the employer shall observe, or cause to be observed, due and customary supervision over the employé for the prevention of default, and if the employer shall at any time during the currency of this bond, condone any act or default upon the part of the employé which would give the employer the right to claim hereunder, and shall continue the employé in his service without written notice to the company, the company shall not be responsible hereunder for any default of the employé which may occur subsequent to such act or default so condoned.'

"Now, gentlemen, as I said, this is a bond given to secure the bank against loss by reason of the fraudulent acts of McKnight. It was not given idly; it was given for the very purpose of securing the bank against McKnight's fraudulent acts; but at the same time these obligations upon the part of the bank were also expressed in the contract and must receive reasonable and fair consideration, and they must be given due weight; but of course these contracts are generally written by the security companies themselves, with great pains, great elaboration is used for the purpose of putting in as many things as possible for the assured to do, I mean the bank in this case. These conditions must be observed by the bank, but they must be observed on a reasonable construction of these terms, on a construction that the court thinks is the just and proper one. The provision that the employer shall observe, or cause to be observed, due and customary supervision over the employé
63 for the prevention of default, is an important part of this contract, and its proper meaning important to be ascertained. What is due or customary supervision is something that has not been made very clear by the evidence in making out this defence. I do not know that it has been made clear to the jury any more than it has to the court as to what is the customary supervision that is meant, or what is the due supervision that is meant. Possibly it may mean, and may be fairly considered to mean, a reasonable vigilance upon the part of the bank to prevent defaults.

"Now, what is meant by that word default in this connection? I suppose that it may fairly be said that it means that there shall be observed due and customary supervision over the employé for the prevention of fraudulent acts. I suppose it is just to say that this word default means the violation of this contract, or the doing of such an act as could be brought fairly within the provisions of this bond. That is to say, the word default here would mean precisely what the previous part of the bond meant when it said fraudulent acts of McKnight. So that this obligation that the bank assumed here was to use due and customary supervision over the employé for the prevention of his committing fraudulent acts. Now, it is for you to say whether—there is no satisfactory proof upon that subject—whether there was due and customary supervision to prevent McKnight from perpetrating these frauds. The contract goes on to say if the employer shall at any time during the currency of this bond condone any act or default on the part of the employé which would give the employer the right to claim hereunder, and shall continue the employé in its service without written notification to the company, the company shall not be responsible hereunder for any default of the employé which may occur subsequent to such act or default so condoned. Now, it is not very clear from the evidence what is claimed to bring this case within that clause of the contract. Possibly those overdrafts may be considered in that connection. Now, I take it that a mere overdraft by the president of a bank, which has been paid by the cashier and for which the cashier would also be responsible to the bank if he paid it wrongfully, a mere overdraft without regard to the amount of it, say $10 or $15,

a mere overdraft of the president on the funds of the bank, would not of itself be a fraudulent act. You would not infer it was a fraudulent act upon the mere act of his making an overdraft; and I suppose if the bank consented to these overdrafts, that they would not be fraudulent acts upon the part of the president, or any-
64 body else that would make an overdraft. The mere fact of drawing for more than you have got in the bank without any fraudulent intent in that mere transaction would hardly be a fraudulent act within the meaning of this bond. Now, I suppose in this case if the bank had known that McKnight was making these drafts for these various fraudulent purposes, such as buying up councilmen, buying up aldermen, paying his own private personal debts—if the bank had known and consented to it, there would not have been a fraudulent act by McKnight for which the bank could recover against this company. But if you believe from the evidence that the bank did not know of the fraudulent purposes for which these overdrafts were made, if the overdrafts were made in connection with this matter—if you believe the bank did not know the fraudulent purposes, then that changes the result; because if the bank did not know it and still consented to it, it would not relieve the act of McKnight from the character of being a fraudulent act. So that, as I view this case—you must remember, however, that you are the sole judges of the evidence in this case, its credibility—as I view this case, however, there would be no fraudulent acts upon McKnight's part, limiting my observations now to the overdrafts, there would be no fraudulent act upon his part merely in an overdraft, if there were no fraudulent intent behind it which was concealed from the bank."

And the defendant objected to the foregoing charge, because it did not correctly submit to the jury the consideration of knowledge on the part of the officers or directors of the bank, other than McKnight, which they had, or would have had if customary supervision had been exercised. The court overruled the objection and allowed the charge to stand, to which the defendant then excepted, and still excepts.

Sixth. The court further said in his charge to the jury:

"I do not think that the knowledge of a cashier of a bank, speaking generally, is the knowledge of the bank as to any matter that does not come within the customary or ordinary duties of a cashier or those which have been specially imposed upon him by the action of the bank. I do not think Mr. R. E. Reutlinger, in this case, in respect to any matter which he knew or could do, represented the bank, if it was outside of his ordinary duties; and I do not recall anything that he knew, so far as the proof shows, that would in anywise affect the liability of the defendant in this case."

The defendant objected to the foregoing portion of the
65 charge, on ground that the knowledge of the cashier of the acts of McKnight in respect to his overdrafts, his transaction- with Britt and Reeder and with Edmunds and Sachs, was the knowledge of the bank, and that the jury should have been so

told; but the court overruled the objection and allowed the charge to stand, to which the defendant then excepted, and still excepts.

Seventh. The court in its charge further says:

"Now, the vice-president of the bank tells you that he was about there as vice-president, on a small salary, largely because it was supposed that he knew of the solvency, understood generally the financial condition of the customers of the bank. He was not its chief executive officer; he was not the manager of the bank; and the mere fact that he may have occasionally gone in and assisted in the way that he explained to you, the cashier, in the discharge of his duties, particularly when the cashier was necessarily absent on account of sickness, I do not think that he would then have any more power to bind the bank by his acts than the cashier himself could have done if present.

"The testimony in respect to the knowledge of the bank of the purpose for which the $2,000 was taken out at half past six or seven o'clock in the evening, I say the knowledge of the bank respecting that must be proven, in my judgment, in such a way as to satisfy the jury that the bank, as distinguished from any mere director of it, knew of that transaction. The elder Reutlinger tells you that he did not know the purpose for which that money was taken out of the bank. He knew it was taken out after the ordinary banking hours, being taken out at seven or half past seven o'clock. The bank sometimes, for special reasons he named, had been kept open. Now, there is no inference to be drawn against R. E. Reutlinger because he, at the instance of the president, kept open the bank for the purpose of, as he said, introducing certain friends at that hour. If Mr. R. E. Reutlinger had known of the fraudulent purpose of McKnight, or had participated in it, that might have been a different thing; but he says he did not. He did not know what this money was paid out for. On demand of the president he paid the money, on the discount arranged by the president, and that is all he knew about it. The only conflict of evidence in the case is that Mr. Reisch says that within a short time, a day or two afterward, he was informed by the elder Reutlinger that this money was used for this political or corrupt purpose. It is for you to reconcile this statement. If you believe from the evidence that the
66 bank did know of this fraudulent purpose, and that this default of McKnight's, this fraudulent act of McKnight's in getting this $2,000, was known to the bank at the time, then I instruct you that all of the liability of the defendant in this case would cease then, that being the earliest, or one of the earliest, if — the earliest, of all these transactions. If you believe from the evidence that this transaction was known and condoned by the bank at the time, before these other transactions occurred, then the defendant in this case is not liable. But if you believe, on the contrary, that the bank did not know it, that it was the fraudulent act of McKnight alone, not participated in by the bank—when I say the bank, I mean the bank, I do not mean any individual director—then the defendant is liable."

Thereupon the defendant objected to that portion of the charge,

because it declared that the knowledge of an individual director of the acts of McKnight was not the knowledge of the bank, and that he should have instructed the jury that the knowledge of the vice-president, who was a director, or of Mr. Reusch, a director, should be imputed to the bank itself. But the court overruled the objection and allowed the charge to stand as above written, to which the defendant then excepted, and still excepts.

Eighth. After the jury had retired for the consideration of the case they afterwards, at their request, were brought into open court, in the presence of counsel for both sides, and thereupon the court said as follows:

"The jury have addressed to the court, in writing, this inquiry: 'If the jury agree that the directors of the bank were careless in the management of the bank, shall the jury find for the defendant?'

"Gentlemen of the jury, no such issue as that stated in this question was presented. The mere question of whether or not the directors generally were careless in their management of the bank is not a question for your consideration, nor would it exempt the defendant from the obligation imposed by the bond sued on. You have already been instructed as to the meaning and effect of the condition of the bond as to due and customary supervision, and outside of that there is no provision as — carelessness."

And the defendant thereupon, in the presence of the jury, objected to the foregoing instruction of the court, on the ground that it was erroneous and misleading. But the court overruled the objection, to which the defendant, by counsel, then excepted, and still excepts.

WALTER EVANS, *Judge.*

67 And thereafter, and within the time specified, the defendant, The Fidelity & Deposit Company of Maryland, by its counsel, presented this, its bill of exceptions herein, and prayed that it be signed, sealed and enrolled as a part of the record, which is now done.

And on the 15th day of July, 1899, came the defendant, by its attorneys, and filed its petition for a writ of error, and assignment of errors, and on its motion, it is ordered that the writ of error be allowed herein, upon condition that the said defendant execute a supersedeas bond in the penalty of $15,000.00, conditioned according to law, and thereupon the defendant filed its said bond, with St. John Boyle as surety, which bond is approved.

Said petition for writ of error is as follows:

United States Circuit Court, Sixth Circuit and District of Kentucky.

R. H. COURTNEY, Receiver, etc., Complainant,
vs.
FIDELITY & DEPOSIT COMPANY OF MARYLAND, Defendant. } No. 6654. At Law.

Petition for Writ of Error.

And now comes The Fidelity & Deposit Company of Maryland, defendant herein, and says that on or about the 3rd day of May, 1899, this court entered judgment herein in favor of the plaintiff against this defendant, in which judgment and the proceedings had prior thereunto in this case certain errors were committed to the prejudice of the defendant, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore, this defendant prays that a writ of error may be issued in its behalf to the United States court of appeals for the sixth circuit for the correction of errors so complained of; that a transcript of the record and proceedings and papers in this cause, duly authenticated, may be sent to the said circuit court of appeals.

ST. JOHN BOYLE AND
EDWARD J. McDERMOTT,
Att'ys for Defendant.

68 Assignment of errors above referred to is as follows:

United States Circuit Court, Sixth Circuit and District of Kentucky.

R. H. COURTNEY, etc., Complainant,
vs.
FIDELITY & DEPOSIT COMPANY, Defendants. } No. 6654. At Law.

Assignment of Errors.

The defendant in this action, in connection with its petition for a writ of error, makes the following assignment of errors, which it avers occurred upon the trial of this action, to wit:

1. The court erred in the rejection of evidence offered by the defendant upon said trial as follows, namely: A letter written on March 11, 1895, by Adolph Reutlinger as vice-president of the German national bank to Herman E. Bosler, the secretary and treasurer of the defendant, relative to the renewal on June 1st, 1895, of the bond given by J. M. McKnight while vice-president of the German national bank, on June 1, 1894, on which bond the defendant was held liable herein.

2. The court erred in the admission of evidence offered by the plaintiff of the following character: A letter of February 18, 1897, by the plaintiff as receiver of the German national bank to the defendant, and which letter was admitted as a notice of the default of J. M. McKnight under his bond, and to which letter the defendant

objected as not being such a notice as the bond called for and as not being sent early enough in time.

3. The court erred in allowing plaintiff to answer the following question: "Was there any statement made to you by Mr. Mullen (assistant of defendant's Louisville agent) as to the notice and proof of claim, as to whether or not he would require any more specific notice?" Over the objection of defendant said witness was allowed to answer said question, and said, "No, sir."

4. The court erred in refusing to permit the defendant to prove by the plaintiff's witness, John Kirwin, that the ledger of the German national bank was $3,000.00 out of balance during all the time he was individual book-keeper or longer, and during all the time said J. M. McKnight was vice-president and president
69 of the bank until it was closed by the comptroller, and that the books were irregular and out of balance during all that time, and that this was reported to the officers of the bank by the national-bank examiner who examined the books for the Comptroller of the Currency.

5. The court erred in refusing to permit the defendant to read as evidence to the jury a letter of Edwin Warfield, president of the defendant, and dated May 15th, 1896, and addressed to the German National Bank of Louisville, Kentucky, and also the reply of R. E. Reutlinger, the cashier of the said bank, written on May 29th, 1896, addressed to the defendant, said letter having been an inquiry by the president of the defendant as to the renewal of the bond of McKnight, and said response being an assurance by the cashier of the bank that said McKnight had up to that time performed his duties in an acceptable and satisfactory manner, and he, the cashier, knew of no reason why the bond should not be continued. Said letters were erroneously excluded on the ground that it had not appeared from the evidence that there was special authority from the board of directors to the cashier to write said letter of response of May 29th, 1896.

Said court also erroneously refused to allow the defendant to prove by circumstantial evidence that the board of directors selected the bondsman of McKnight and paid for the bond, and that the said cashier was acting in this matter with the knowledge and for the benefit and with the approval of the board of directors.

6. The court erred in giving to the jury the following instructions, to each of which the defendant objected and excepted at the time, namely:

Instruction 1.

"Before, however, going into that I should have said, if I have not, that the action that was brought in the Jefferson circuit court, some time in March, 1897, for the recovery of certain debts, should have no effect in your deliberations in this case. That was a suit, not upon this indebtedness except in respect to one particular item, that of $3,736, but was a suit upon other indebtedness. It is a suit in several paragraphs, one of which is upon notes and obligations executed by McKnight to the bank, but the only one of the items

mentioned in that suit that is contained in the suit in the State court is that of $3,736, which represents money that had been paid through the Union national bank upon the debt of one Embry.
70 I need not go into any reasons with you upon the subject, but the court is clearly of the opinion that no importance should be attached to that suit or any of its affirmations in your deliberations in this case."

Counsel for defendant objected and excepted to the foregoing portion of the charge. Three of the items set out in said action are now embraced in this action on said bond; and the plaintiff's notice thereof to defendant & the demand upon defendant therefor were delayed too long.

Instruction 2.

"The defendant insists upon this clause of the contract between it and the bank, that the 'employer shall immediately give the company notice in writing of the discovery of any default or loss hereunder, and shall file its or their claims hereunder, with full particulars thereof, as soon as practicable thereafter, and no claim which shall not be so filed by the employer with the company, within six months after the expiration or cancellation of its bond, or within six months after the employé shall have ceased to be in the employer's service, shall be payable hereunder.' In considering that clause of the contract between these parties I do not think the word 'immediate' should be given such construction as that it would mean instantly, but I believe it conforms with the views of the supreme court and the authorities generally to tell you that it means that it was the duty of the plaintiff in this case to give, as soon as reasonably practicable and with promptness, notice of the discovery of any default. It did not mean that as soon as one was suspected that notice should be given, but if you believe from the evidence that within a reasonable time after the receiver in this case, and you must remember that he is the receiver merely, and that he knew nothing about the management of this bank, nothing of its affairs, until he was appointed—if you believe that within a reasonable time after he discovered, actually discovered a default, he gave the notice of the 18th day of February, 1897, you are at liberty to infer that that part of the obligation of this bond has been performed."

The plaintiff's letter of February 18th, 1897, was not such notice or claim as was required by the contract, and was not early enough in time, and said instruction was misleading.

Instruction 3.

"It (the bond) also requires that the insured, that is to say,
71 the bank, shall file with the company his or their claim hereunder, with full particulars thereof, as soon as practicable. Now I do not believe that that means that the particulars shall be filed until they are known. In this case the evidence I think will justify you in the conclusion that this claim was made as soon as

particulars of this kind were known. One of the important reasons why this suit that was filed in the State court was not regarded as important evidence in this was that it does not show anything concerning the particulars of this debt, nor does it show that the plaintiff had known the particulars before this suit was filed. I think you will be justified in concluding from the evidence that with reasonable promptness, after the particulars of this claim were ascertained by the plaintiff, that this claim was made in such detail that no fault has been found with it so far as has appeared."

There was no sufficient evidence that would justify the jury in finding that the particulars were filed within a reasonable time. It appeared from the suit in the State court mentioned in the charge that the receiver in this case had knowledge of the particular default of $3,736 and two others which were combined as $2,253.00 one being for $10,000.00 and one for $1,253.00 when he filed that suit on March 6th, 1897, and still he sent no proper notice or claim to defendant till July 3rd, 1897, and said instruction was misleading and erroneous.

Instruction 4.

"The only other two clauses to which I need call your attention at all are perhaps most important for you to consider. The first one, though not the first one in the paper, that I allude to, is that which reads in this way: 'That there shall be complete inspection of the accounts and books of the employé, on behalf of the employer, at least once in every twelve months from the date of this bond, such inspection shall include an examination of all cash and securities of which the employé shall have custody or charge.'

"Now, gentlemen, the evidence on that subject has not been full. It is for you to determine whether there was that inspection, that complete inspection of the accounts and books of the employé on behalf of the employer, within at least every twelve months, and whether it included an examination of the cash and securities which the employé shall have personally in charge. This would be a much more important consideration if the president of the
72 bank instead of the cashier had charge of the securities or cash of the bank. The president, I tell you as a matter of law, does not have charge of the cash or securities of a bank, so that the president is probably but little concerned with this particular clause of this contract."

Said instruction was misleading and erroneous.

Instruction 5.

"The other, the last clause to which I will call your attention reads this way: 'That the employer shall observe or cause to be observed due and customary supervision over the employé, for the prevention of default, and if the employer shall at any time during the currency of this bond, condone any act or default upon the part of the employé which would give the employer the right to claim

hereunder, and shall continue the employé in his service without written notice to the company, the company shall not be responsible hereunder for any default of the employé which may occur subsequent to such act or default so condoned.'

Now, gentlemen, as I said, this is a bond given to secure the bank against loss by reason of the fraudulent acts of McKnight. It was was not given idly; it was given for the very purpose of securing the bank against McKnight's fraudulent acts; but at the same time these obligations upon the part of the bank were also expressed in the contract and must be given due weight; but of course these contracts as generally written by the security companies themselves, with great pains, great elaboration is used for the purpose of putting in as many things as possible for the assured to do, I mean the bank in this case. These conditions must be observed by the bank, but they must be observed on a reasonable construction of these terms, on a construction that the court thinks is the just and proper one. The provision that the employer shall observe or cause to be observed due and customary supervision over the employé for the prevention or default, is an important part of this contract and its proper meaning important to be ascertained.

What is due or customary supervision is something that has not been made very clear by the evidence in making out this defense. I don't know that it has been made clear to the jury any more than it has to the court, as to what is the customary supervision that is meant, or what is the due supervision that is meant. Possibly it may mean and may be fairly considered to mean a reasonable vigilance upon the part of the bank to prevent defaults.

Now what is meant by that word default in this connec-
73 tion? I suppose that it may fairly be said that it means that there shall be observed due and customary supervision over the employé for the prevention of fraudulent acts. I suppose it is just to say that this word default means the violation of this contract, or the doing of such an act as could be brought fairly within the provisions of this bond. That is to say, the word default here would mean precisely what the previous part of the bond meant when it said fraudulent acts of McKnight. So that this obligation that the bank assumed here was to use due and customary supervision over the employé for the prevention of his committing fraudulent acts. Now it is for you to say whether there is no satisfactory proof upon that subject—whether there was due and customary supervision to prevent McKnight from perpetrating these frauds. The contract goes on to say if the employer shall at any time during the currency of this bond condone any act or default on the part of the employé, which would give the employer the right to claim hereunder, and shall continue the employé in its service without written notification to the company, the company shall not be responsible hereunder for any default of the employé which may occur subsequent to such act or default so condoned. Now it is not very clear from the evidence what is claimed to bring this case within that clause of the contract. Possibly those overdrafts may be considered in that connection. Now I take it that a mere overdraft by the

president of a bank which had been paid by the cashier, and for which the cashier would also be responsible to the bank if he paid it wrongfully, a mere overdraft without regard to the amount of it, say $10 or $15, a mere overdraft of the president on the funds of the bank would not of itself be a fraudulent act.

You would not infer it was a fraudulent act upon the mere act of his making an overdraft; and I suppose if the bank consented to these overdrafts, that they would not be fraudulent acts upon the part of the president, or anybody else that would make an overdraft. The mere fact of drawing for more than you have got in the bank without any fraudulent intent in that mere transaction, would hardly be a fraudulent act within the meaning of this bond. Now, I suppose in this case, if the bank had known that McKnight was making these drafts for these various fraudulent purposes, such as buying up councilmen, buying up aldermen, paying his own private personal debts; if the bank had known that and consented to it, there would not have been a fraudulent act by McKnight for which the bank could recover against this company. But if you
74 believe from the evidence that the bank did not know of the fraudulent purposes for which these overdrafts were made, if the overdrafts were made in connection with this matter—if you believe the bank did not know the fraudulent purposes, then that changes the result; because if the bank did not know and still consented to it, it would not relieve the act of McKnight from the character of being a fraudulent act. So that, as I view this case—you must remember, however, that you are the sole judges of the evidence in this case, its credibility—as I view this case, however, there would be no fraudulent acts upon McKnight's part, limiting my observations not to the overdrafts, there would be no fraudulent act upon his part merely in an overdraft, if there were no fraudulent intent behind it, which was concealed from the bank."

The foregoing instruction did not submit correctly to the jury consideration of knowledge on the part of the officers or directors of the bank other than McKnight which they had or would have had if customary supervision had been exercised.

Instruction 6.

"I do not think that the knowledge of a cashier of a bank, speaking generally, if the knowledge of the bank as to any matter that does not come within the customary or ordinary duties of a cashier or those which have been specially imposed upon him by the action of the bank. I do not think Mr. R. E. Reutlinger in this case, in respect to any matter which he knew or could do, represented the bank, if it was outside of his ordinary duties; and I do not recall anything that he knew, so far as the proof shows that would in anywise affect the liability of the defendant in this case."

The defendant objected to the foregoing portion of the charge on the ground that the knowledge of the cashier of the acts of McKnight in respect to his overdrafts and his transactions with Britt

& Reeder and with Edmunds and Sachs, etc., was the knowledge of the bank.

Instruction 7.

"Now, the vice-president of the bank tells you that he was about there as vice-president, on a small salary largely because it was supposed that he knew of the solvency, understood generally the financial condition of the customers of the bank. He was not its chief executive office-; he was not the manager of the bank, and the mere fact that he may have occasionally gone in and assisted in the way that he explained to you, the cashier in the discharge of his duties, particularly when the cashier was necessarily absent on account of sickness; I do not think that he would then have any more power to bind the bank by his acts than the cashier himself could have done if present.

The testimony in respect to the knowledge of the bank of the purpose for which the $2,000 was taken out at half past six or seven in the evening, I say the knowledge of the bank respecting that must be proven, in my judgment, in such a way as to satisfy the jury that the bank, as distinguished from any mere director of it, knew of that transaction. The elder Reutlinger tells you that he did not know the purpose for which that money was taken out of the bank. He knew it was taken out after the ordinary banking hours, being taken out at seven or half past seven o'clock. The bank sometimes for special reasons he named had been kept open. Now, there is no inference to be drawn against R. E. Reutlinger because he at the instance of the president kept open the bank for the purpose of, as he said, introducing certain friends at a late hour. If Mr. R. E. Reutlinger had known of the fraudulent purpose of McKnight or had participated in it, that might have been a different thing; but he says he did not. He did not know what this money was paid out for. On the demands of the president he paid the money, on the discount arranged by the president, and that is all he knew about it. The only conflict of evidence in the case is that Mr. Reisch says that within a short time, a day or two afterward, he was informed by the elder Reutlinger that this money was used for this political or corrupt purpose. It is for you to reconcile this statement. If you believe from the evidence that the bank did know of this fraudulent purpose, and that this default of McKnight's, this fraudulent act of McKnight's, in getting this $2,000, was known to the bank at the time, then I instruct you that all of the liability of the defendant in this case would cease then, that being the earliest, or one of the earliest, if not the earliest of all these transactions. If you believe from the evidence that this transaction was known and condoned by the bank at the time, before these other transactions occurred, then the defendant in this case is not liable. But if you believe on the contrary that the bank did not know it, that it was the fraudulent act of McKnight alone, not participated in by the bank—when I say the bank, I mean the bank, I do not mean any individual director—then the defendant is liable."

76 The defendant objected to that portion of the charge because it declared that the knowledge of an individual director or directors of the acts of McKnight was not the knowledge of the bank, and the jury should have been instructed that the knowledge of the vice-president, who was a director, and of Mr. Reisch, a director, should be imputed to the bank itself; but the court erroneously overruled the objection of defendant and let said instruction stand.

Instruction 8.

During its consideration of this case, the jury asked further instructions of the court, and the jury being brought into open court in the presence of counsel for both sides, the following proceedings were had:

By the COURT: The jury have addressed to the court in writing, this inquiry:

"If the jury agree that the directors of the bank were careless in the management of the bank, shall the jury find for the defendant?"

"Gentlemen of the jury, no such issue as that stated in this question was presented. The mere question of whether or not the directors generally were careless in their management of the bank is not a question for your consideration, nor would it exempt the defendant from the obligation imposed by the bond sued on. You have already been instructed as to the meaning and effect of the condition of the bond as to due and customary supervision and outside of that there is no provision as to carelessness."

And to this instruction the defendant objected, because it was misleading and erroneous.

ST. JOHN BOYLE &
EDWARD J. McDERMOTT,
Att'ys for Defendant.

The supersedeas bond above referred to is as follows:

Circuit Court of the United States, District of Kentucky.

R. H. COURTNEY, Receiver of the German National Bank of Louisville,
vs.
THE FIDELITY & DEPOSIT COMPANY OF MARYLAND.

77 Know all men by these presents, that we, Fidelity & Deposit Company of Maryland, as principal, & St. John Boyle, surety, are held and firmly bound unto R. H. Courtney, receiver of the German National Bank of Louisville, in the sum of fifteen thousand dollars, to be paid to the said R. H. Courtney, receiver of the German National Bank of Louisville, executors or administrators. To which payment well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our, and

each of our, heirs, executors and administrators, firmly by these presents.

Sealed with our seals, and dated this 15th day of July, A. D. 1899.

Whereas, the above-named Fidelity & Deposit Company of Maryland hath prosecuted a writ of error to the United States circuit court of appeals for the sixth circuit to reverse the judgment rendered in the above-entitled suit, by the circuit court of the United States for the district of Kentucky, at Louisville:

Now, therefore, the condition of this obligation is such, that if the above-named Fidelity & Deposit Company of Maryland shall prosecute its said writ of error to effect, and answer all damages and costs, if it shall fail to make good its plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

FIDELITY & DEPOSIT CO. OF MARYLAND,
By ST. JOHN BOYLE, *Att'y.* [L. S.]
ST. JOHN BOYLE. [L. S.]

Sealed and delivered in presence of:
HENRY F. CASSIN,
Deputy Clerk, U. S. Court.

Approved July 15", 1899.
WALTER EVANS, *Judge.*

DISTRICT OF KENTUCKY, *ss:*

I, Thomas Speed, clerk of the circuit court of the United States for the district of Kentucky, at Louisville, do hereby certify that the foregoing 106 pages contain a true and correct transcript of the record and proceedings in the case wherein R. H. Courtney, receiver of the German National Bank of Louisville, is plaintiff, and The Fidelity & Deposit Company of Maryland is defendant, as the same appears from the files and record in my said office.

Witness my hand and seal of said court, this 24th day of July, 1899.

[SEAL.]

THOS. SPEED, *Clerk,*
By HENRY F. CASSIN, *D. C.*

78 UNITED STATES OF AMERICA, } *ss:*
District of Kentucky, Sixth Judicial Circuit, }

The President of the United States to the honorable the judges of the circuit court of the United States for the district of Kentucky, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between R. H. Courtney, receiver of the German National Bank of Louisville, plaintiff, against Fidelity & Deposit Company of Maryland, defendant, a manifest error hath hap-

pened, to the great damage of the said Fidelity & Deposit Company of Maryland, as by its complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States circuit court of appeals for the sixth circuit, together with this writ, so that you have the same at Cincinnati, in said circuit, on the * 12th day of August next, in the said circuit court of appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said circuit court of appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 15th day of July, in the year of our Lord one thousand eight hundred and ninety-nine, and of the Independence of the United States of America the one hundred and twenty-fourth.

THOS. SPEED,
Clerk of the Circuit Court of the United States,
Kentucky District,
[SEAL.] By HENRY F. CASSIN,
Deputy Clerk.

Allowed by:
WALTER EVANS,
Dist. Judge.

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* Not exceeding 30 days from the day of signing the citation.

79 UNITED STATES OF AMERICA, } ss:
District of Kentucky, Sixth Judicial Circuit, }

To R. H. Courtney, receiver of the German National Bank of Louisville, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States circuit court for the sixth circuit, to be holden at the city of Cincinnati, in said circuit, on the* 12th day of August next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Kentucky, wherein Fidelity & Deposit Company of Maryland is plaintiff in error, and you are defendant in error, to show cause, if any there by, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 15th day of August, in the year of our Lord one thousand eight hundred and ninety-nine, and of the Independence

of the United States of America the one hundred and twenty-fourth.

[SEAL.] WALTER EVANS,
Dist. Judge.

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* Not exceeding 30 days from the day of signing.

I hereby accept service of the within citation, July 25, 1899.
W. M. SMITH,
Attorney for R. H. Courtney, Receiver.

80 And afterwards, to wit, on August 5th, 1899, præcipe for appearance was filed, which is in the words and figures as follows:

United States Circuit Court of Appeals for the Sixth Circuit, October Term, 1898.

FIDELITY & DEPOSIT CO. OF MARYLAND
vs.
R. H. COURTNEY, Receiver German National Bank. } No. 751.

To the clerk of said court:

Please enter my appearance as counsel for the plaintiff in error.
ST. JOHN BOYLE.

And afterwards, to wit, on October 26th, 1899, a stipulation was filed clothed in the words and figures as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

THE FIDELITY & DEPOSIT COMPANY OF MARYLAND
v.
R. H. COURTNEY, Receiver. } Stipulation.

It is agreed between the parties herein that this cause shall be continued for argument until the November session of this court.
W. M. SMITH, *Att'y for Receiver.*
ST. JOHN BOYLE &
EDWARD J. McDERMOTT,
For Plaintiff in Error.

81 And afterwards, to wit, on November 14th, 1899, a stipulation postponing argument was filed, which reads and is as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

THE FIDELITY & DEPOSIT COMPANY, Plaintiff in Error,
vs.
R. H. COURTNEY, Receiver. } Stipulation.

It is agreed between the plaintiff in error and the defendant in error that this case shall be postponed for argument to the January term.

ST. JOHN BOYLE &
E. J. McDERMOTT,
For Plaintiff in Error.
W. M. SMITH,
For Defendant in Error.

And afterwards, to wit, on January 2nd, 1900, a stipulation continuing argument to the February term was filed, which is in the words and figures as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

FIDELITY & DEPOSIT COMPANY, Plaintiff in Error,
vs.
R. H. COURTNEY, Receiver. } Stipulation.

On motion of the defendant in error, and with the consent of the plaintiff in error, this case is passed for argument to the February term.

ST. JOHN BOYLE &
E. J. McDERMOTT,
Att'ys for the Plaintiff in Error.
W. M. SMITH,
Att'y for R. H. Courtney, Receiver, &c.

82 And afterwards, to wit, on February 15th. 1900, an entry was made upon the journal of said court, which reads and is as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

FIDELITY & DEPOSIT CO. OF MARYLAND
vs.
R. H. COURTNEY, Rec. of German National Bank of Louisville.

This cause coming on to be heard this day, it was argued on behalf of the plaintiff in error by Hon. E. J. McDermott and on behalf of the defendant in error by Mr. Wm. M. Smith, and the further hearing is continued until Monday morning, the 19th, at 9.30, or 26th, at 9.30 a. m.

And afterwards, to wit, on February 26th, 1900, an entry was made upon the journal of said court, which is in the words and figures as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

FIDELITY & DEPOSIT CO. OF MARYLAND
vs.
R. H. COURTNEY, Receiver.

This cause having been continued for hearing until this day, it was further argued for the plaintiff in error by Hon. E. J. McDermott and was submitted to the court. Plaintiff is granted one week within which to file reply brief.

83 And afterwards, on July 13th, 1900, a judgment was rendered in said cause, which reads and is as follows:

Judgment.

84 United States Circuit Court of Appeals for the Sixth Circuit.

THE FIDELITY & DEPOSIT CO. OF MARYLAND
v.
R. N. COURTNEY, Receiver of the German National Bank of Louisville, Ky. } No. 751.

Error to the circuit court of the United States for the district of Kentucky.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Kentucky, and was argued by counsel.

On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said circuit court in this cause be, and the same is hereby, affirmed with costs.

85 And afterwards, to wit, on July 23rd, 1900, an opinion was filed in said cause, which is in the words and figures as follows:

Opinion.

86 United States Circuit Court of Appeals, Sixth Circuit.

THE FIDELITY & DEPOSIT COMPANY OF Maryland, Plaintiff in Error,
v.
R. H. COURTNEY, Receiver of the German National Bank of Louisville, Defendant in Error. } No. 751. Error to the Circuit Court of the United States for the District of Kentucky.

Submitted February 26, 1900; decided July 13, 1900.

Before Lurton, Day, and Severens, circuit judges.

This action was brought by the receiver of the German national bank against the Fidelity & Deposit Company of Maryland, to recover upon a bond given to indemnify the bank against loss by

fraudulent acts of J. M. McKnight, as president thereof. It appears in the record that on June 1, 1894, McKnight was elected vice-president, and executed his bond for one year. Upon June 1, 1895, he was elected president and the bond was renewed by him as president, and was again renewed for the further period of one year. The petition sets up various defaults, aggregating $18,742.74, and prays judgment for the penalty of the bond in the sum of $10,000. The bond contained, among others, the following provisions:

* * * * * * *

"Whereas, the employé has been appointed in the service of the employer, and has been assigned to the office or position of * * * by the employer, and application has been made to the Fidelity and Deposit Company of Maryland for this bond;

"And, whereas, the said employer has delivered to the company a certain statement, and it being agreed and understood that such statement constitutes an essential part of the contract hereinafter expressed:

87 "Now, therefore, in consideration of the payment of the sum of * * * dollars, lawful money of the United States of America, to the company as a premium for the term commencing at the date hereof and ending on the * * * day of * * *, eighteen hundred and ninety * * *, at 12 o'clock noon, the company does hereby agree that it will, within three months after receipt of proof satisfactory to its directors, and subject to the conditions hereinafter expressed, reimburse the employer to an amount not in excess of the penalty of this bond, for such pecuniary loss as the employer shall have sustained by any fraudulent act or acts committed by the employé during the continuance of this bond, in the performance of the duties of his said office or position, or of such other position as he may be subsequently appointed to or called to fill by the employer in said service of money, securities or other personal property belonging to the employer, or for which the employer is responsible.

"This bond may be continued from year to year, at the option of the employer, at the same or an agreed premium rate, so long as the company shall consent to receive the same, in which case the company shall remain liable for any dishonest act of the employé occurring between the original date of this bond and the time to which it shall have been continued.

"This bond is issued and continued upon and subject to the following conditions and provisions:

* * * * * * *

"That the employer shall immediately give the company notice, in writing, of the discovery of any default or loss hereunder, and shall file with the company his or their claims hereunder, with full particulars thereof, as soon as practicable thereafter, and no claim which shall not be so filed by the employer with the company within six months after the expiration or cancellation of this bond,

or within six months after the employé shall have ceased to be in the employer's service, shall be payable hereunder.

* * * * * * *

"That upon notification to the company of any loss hereunder, the company's liability shall thereupon terminate as regards any subsequent act of the employé.

"That the employer shall observe, or cause to be observed, due and customary supervision over the employé for the prevention of default; and if the employer shall at any time during the currency of this bond condone any act or default on the part of the employé which would give the employer the right to claim hereunder and shall continue *to* the employé in its service without written notification to the company, the company shall not be responsible hereunder for any default of the employé which may occur subsequent to such act, or default so condoned.

* * * * * * *

"That there shall be a complete inspection of the accounts and books of the employé on behalf of the employer at least on-e in every twelve months, from the date of this bond, such inspec-
88 tion to include examination of all cash and securities which the employé shall have custody or charge.

"That the employé has not, within the knowledge of the employer, been at any time in arrears or default either in this or other employment.

"That the employer shall at once notify the company on becoming aware of the employé being engaged in speculation or gambling, or indulging in any disreputable or unlawful habits or pursuits.

* * * * * * *

"That the company may, upon giving one month's notice, in writing, to the employer, cancel its responsibility hereunder in so far as it concerns the acts or defaults of the employé subsequent to the end of such month; in which event it will, upon request of the employer, refund the proportion of the premium paid for the unexpired term of this bond."

The amended answer recites the provisions of the bond and sets up that neither the bank nor the receiver ever gave notice to the Fidelity and Deposit Company of Maryland of the defaults as required; that the bank did not observe the due and customary supervision over McKnight; that the vice-president, who was also a director, knew of the embezzlements of McKnight, yet neither the bank nor the receiver notified the company until long after the bank was closed, in January, 1897; that the receiver did not file his claim against said company until the 18th of February, 1897; that this notice did not give the particulars of McKnight's default, and that defendant did not fully know the same until the second of July, 1897; that Rudolph Reutlinger was teller and cashier, and as such had charge of such financial affairs as pertained to said offices; that Adolph Reutlinger was vice-president and was daily in the bank

and thoroughly familiar with all its business affairs and with the acts and defaults of said McKnight as president; that the directors were also familiar with McKnight's overdrafts; that McKnight's defaults and embezzlements were known to the directors, who allowed them to go on without the knowledge of the Fidelity and Deposit Company; that during the time McKnight was in office the books were out of balance about $3,000; that the directors and officers allowed McKnight to be constantly overdrawn in his personal account; that his overdraft, January 18, 1896, was $1,340.14, and on June 8, 1896, it was $626.23, and that, day in and day out, he was overdrawn, of which fact the directors had knowledge; and these irregular acts and defaults were not known to said defendant, otherwise it would have canceled the bond; that before the renewal of the bond in 1895–1896, it wrote the bank to ascertain if McKnight had been conducting himself properly, and was informed by
89 the cashier that McKnight had discharged his duties faithfully; that such statements were made with the knowledge of the directors, but that said statements were false and fraudulent, which at the time was unknown to said defendant, and that thereby the company was led to renew the bond, which otherwise would have been canceled. And by another amended answer it is charged that McKnight's wrong doings were known to the directors of the bank when they occurred or within a few days thereafter, but that said defendant was not notified until long after the bank went into the hands of a receiver. Replication was filed and the case went to trial, resulting in a verdict for plaintiff. Testimony was offered, tending to show various transactions of McKnight's in the course of his business in the bank, among other things, the overdrafts of McKnight; and that checks were given by him and carried by the cashier as cash items at the direction of McKnight for a considerable length of time. There is also testimony tending to show that McKnight, while a candidate for office of mayor in the city of Louisville, which office was to be filled by the council of said city, obtained $1,000 for one Edmunds, in bills of $100 each, which money was obtained on Edmunds' check, he, at the time, having no account at the bank as an individual, but Edmunds & Co. had an account there. Edmunds testified he understood the check was to be taken care of by McKnight. It was also testified that a loan was procured of $2,000 to Britt and Reeder, which money was obtained at the bank after banking hours, and that McKnight said he had a big scheme on hand and it appeared this money was given for the purpose of obtaining an illegal contract with the councilmen as to possible legislation which might come before them. McKnight, on being asked for an explanation of the matter, claimed that it was all right; that the note was good; that the matter was brought before the board of directors, where McKnight made an explanation to the same effect, and that it seemed to satisfy the board.

DAY, J., after thus stating the case, delivered the opinion of the court:

1. It is unnecessary to enter into a detailed account of the various defaults, or comment upon the knowledge thereof of the bank directors, as there was a conflict of testimony upon that subject, upon which the court charged the jury as follows:

"There was also evidence tending to show that J. M. McKnight was president of the bank, and the other officers of the bank, including the directory, had entire confidence in his honesty and integrity up to the time the bank was closed; that none of them had any knowledge that any act of his, in the management of said bank, was fraudulent or dishonest, until after the closing of the bank; that said bank had a discount committee who regularly examined and passed on the papers of the bank, as required of such committee, and the directory of said bank undertook to make a monthly investigation, sometimes twice a month, of the affairs of said bank, and required the president to go through the same with them and make a full report thereon; that some of the directors were in the bank almost daily inspecting its affairs, and that they did, at all times, observe due and customary supervision over said president for the prevention of default; that none of the officers of said bank, including the directory, had any knowledge of the various checks set up in the petition as fraudulent, and that were charged to the account of other parties than those drawing them, or on whom they were drawn, except the clerks who charged them up to said account as stated, and there was evidence tending to show that they charged them up to such accounts by the direction of McKnight, the president, and except further, R. E. Reutlinger, the cashier and teller of said bank, knew of said checks when they came into said bank, and was instructed to hold them as cash items by McKnight, but further than this he had no knowledge.

"As to the $2,000 Britt and Reeder note, there was also evidence tending to show that R. E. Reutlinger was required to stay at the bank until after banking hours, and was directed by McKnight to, and did lay out the $2,000 on said note to said parties, but that further than this he had no knowledge thereof.

"There was also evidence tending further to show that said R. E. Reutlinger informed his father, Adolph Reutlinger, vice-president, of the payment of this $2,000 that night, and that said Adolph Reutlinger made inquiry of McKnight to explain the transaction. That thereupon, McKnight told him that said parties were good and solvent, and the note was regularly discounted and all right, and that if required, Gaulbert or Whallen would sign same with them, and that he, McKnight, would guarantee the payment thereof; that the parties were obliged to have the money that night, and he so kept the bank open to let them have it.

"There was evidence tending further to show that said Adolph Reutlinger then went before the directory and told them what McKnight had said in regard to this note, and said to them that he had made some investigation and could not find that these parties

had any property; that he was unable to say whether or not they were good, and that thereupon McKnight came before said directory and made the same statement to them that he had made to Adolph Reutlinger, assuring them that the note was good, and that said directors believed him and relied on his statement, and so passed the note; that there was no other evidence tending to show any further knowledge of said note, or its true character, by the officers
91 or any of the directors of the bank than is herein stated, except in the testimony of Jacob Reisch, one of the directors, that some short time after the execution of said note, Adolph Reutlinger told him what he had learned thereof as herein stated, and further he says that said Reutlinger told him that the money was used in the mayor's race. This latter statement Adolph Reutlinger denied in his evidence."

Upon the subject of the duty of the bank, under these circumstances to notify the company of these transactions that it might end its obligations under the bond, if it saw fit to do so, the court charged the jury:

"Now, I suppose in this case, if the bank had known that McKnight was making these drafts for these various fraudulent purposes, such as buying up councilmen, buying up aldermen, paying his own personal debts; if the bank had known that and consented to it, there would not have been a fraudulent act by McKnight for which the bank could recover against this company. But if you believe from the evidence that the bank did not know of the fraudulent purposes for which the overdrafts were made, if the overdrafts were made in connection with this matter—if you believe the bank did not know the fraudulent purposes, then that changes the result; because if the bank did not know and still consented to it, it would not relieve the act of McKnight from the character of being a fraudulent act. So that, as I view the case—you must remember, however, that you are the sole judges of the evidence in this case and its credibility—as I view this case, however, there would be no fraudulent acts upon McKnight's part, limiting my observations now to the overdrafts, there would be no fraudulent acts upon his part merely in an overdraft, if there were no fraudulent intent behind it, which was concealed from the bank."

We think this instruction as favorable as the company was entitled to, and under it, if the jury found that the bank had knowledge that McKnight was doing the acts in question for fraudulent purposes, there could be no recovery upon the bond. We must remember that this obligation was intended to secure the bank against the fraudulent conduct of McKnight in the performance of the duties of his office or position; that McKnight's action, in order to require notice to the company, must have been "of the discovery of a default or loss under the bond." While McKnight might have been guilty of reprehensible conduct it would not require notice unless such as might result in the loss of security or money or personal property of the bank by fraudulent conduct in the performance of his duties to the bank. Such conduct as amounts to a default under the bond the employer is bound to report and if he condones or continues the

employé in his service, without written notice to the com-
92 pany, the latter would be discharged from responsibility. Misconduct, which would not amount to a fraudulent act affecting the duties of the officer of the bank, would not require notice unless it came within that clause of the bond which requires the employer to notify the company when the employé engages in gambling or speculation, or indulges in disreputable or unlawful habits or pursuits. Whether McKnight's conduct was of this character the court left to the jury to determine. They must have found that there was no such misconduct as would avoid the bond while the bank was in operation and which it was the duty of the bank to report to the company. In this connection it is averred that the court erred in saying that this knowledge must be the knowledge of the bank, intending thereby to exclude the knowledge of individual directors. In the charge above quoted, as to the knowledge of the bank directors, we have already said we find no error. We have carefully examined the record and find no knowledge brought home to the directors individually or the cashier in his individual capacity which was not brought to the attention of the board, which would amount to a default under this bond. Such knowledge, in order to be binding upon the bank, must have been acquired in the course of business of the bank transacted by such officer or director. It is not necessary to examine the numerous authorities cited upon this proposition. They are well summed up in Boone on the Law of Banking, sec. 132:

"Notice to the directors of a bank when assembled as a board is notice to the bank; nor can any subsequent change of directors require a new notice. * * * And notice to one or more of the directors, when engaged in the business of the bank, will be deemed notice to the bank."

The testimony shows no such knowledge of McKnight's conduct acquired in the bank's business by individual directors or officers of the bank and not known to the board, as would entitle the company to notice. As was said in American Surety Company *v.* Pauly, 170 U. S., 147:

"It may well be held that the surety company did not intend to require written notice of any act upon the part of the cashier that might involve loss, unless the bank had knowledge, not simply suspicion, of the existence of such facts as would justify a careful and prudent man in charging another with fraud or dishonesty. If the company intended that the bank should inform it of mere rumors or suspicions affecting the integrity of O'Brien, such intention ought to have been clearly expressed in the bond."

93 2. Upon the question of notice of McKnight's default, it is strenuously argued that the notice given by the receiver after he took possession of the bank is not such notice as is required, and for that reason there can be no recovery upon the bond. The bank was closed on the 17th of January, 1897. The receiver was appointed on the 22d of January, 1897. On the 18th of February the receiver gave the following notice:

"LOUISVILLE, KY., *February* 18, 1897.

"To the Fidelity & Deposit Company of Maryland, Baltimore, Md.

"GENTLEMEN: Referring to certificate No. 4043, issued from your security department guaranteeing the fidelity of Jacob M. McKnight, president of the German national bank, under your bond to him, No. 5002, issued June 1, 1894, in favor of such bank, we hereby notify you that said Jacob M. McKnight, as president, has been found in default to this bank, and that you will be required to make indemnity to me as receiver to the extent of said bond.

"Yours truly, R. H. COURTNEY,
"*Receiver German National Bank.*"

When this notice was offered in evidence it was objected to, the attorney for the defendant stating:

"We have no doubt he sent it (the notice), and make no point on that, but we desire to object to the admission of it, as not being the notice required in the contract, and therefore we received no notice whatever."

Exception was taken to the portion of the charge relating thereto, on the same ground that the introduction of the notice in testimony was taken, viz: that it was not such notice as was required by the contract, and was, therefore, misleading.

Neither in this exception, nor when the notice was offered in testimony, was it objected that the notice was not early enough in point of time, but in the assignments of error this averment is added. It may well be doubted if this is not extending the assignment of error beyond the exception taken. Assignments of error cannot broaden an exception, and will not be considered unless called to the attention of the court by proper exceptions. We are of opinion, however, that the court fairly left this question to the jury. It is testified by Mr. Courtney that immediately after the bank passed into his hands as receiver:

"I began to ascertain the defalcations. The experts, Mr.
94 Hays, a Government expert, and Mr. Escott, a national-bank examiner, were at work immediately after Mr. McKnight's arrest. I kept pace with their investigation. It was almost immediately after the bank closed that these defalcations became known; not all of them, but enough to ground the claim upon. I had that notice of February 18, 1897, mailed to the office at Baltimore. It is my impression that I mailed a like notice to the agent here."

The expert, Mr. Escott, testifies:

"We began to get these shortages about two or three weeks after the bank was closed. They were discovered from time to time. I began to discover them in two weeks."

If, as Escott says, they began to discover the shortages two or three weeks after the bank was closed, that would mean the discovery was first made between the 2d and 9th of February, 1897. The court left this question to the jury under the following instructions:

"The defendant insists upon this clause of the contract between

it and the bank that 'the employer shall immediately give the company notice in writing of the discovery of any default or loss hereunder, and shall file its or their claims hereunder, with full particulars thereof as soon as practicable thereafter, and no claim which shall not be so filed by the employer with the company, within six months after the expiration or cancellation of its bond, or within six months after the employé shall have ceased to be in the employer's service, shall be payable hereunder.' In considering that clause of the contract between these parties, I do not think the word 'immediately' should be given such construction as that it would mean instantly, but I believe it conforms with the views of the Supreme Court and the authorities generally to tell you that it means that it was the duty of plaintiff in this case to give, as soon as reasonably practicable and with promptness, notice of the discovery of any default. It did not mean that as soon as one was suspected that notice should be given; but if you believe from the evidence that within a reasonable time after the receiver in this case—and you must remember that he is the receiver merely, and that he knew nothing about the management of the bank, nothing of its affairs, until he was appointed—if you believe that within a reasonable time after he discovered—actually discovered a default—he gave the notice of the 18th day of February, 1897, you are at liberty to infer that that part of the obligation of this bond has been performed."

We think there was not such a lapse of time from the time the receiver began to discover these defaults until he gave the notice of February 18, 1897, as would require the question to be taken from the jury. We have already said no notice is required until
95 the bank had knowledge of facts which would justify it in charging dishonesty. In the Pauley case, *supra*, while it is true the bond says that notice must be given as soon as practicable, instead of immediately, Mr. Justice Harlan, says:

"It was left to the jury to determine when the receiver first acquired knowledge of acts indicating fraud or dishonesty on O'Brien's part, and they found, in effect, that he had no knowledge of any such act until after the report by the expert book-keepers, made about or a few days before May 23, 1892. The trial court went far enough when it said, in response to an inquiry by a juror, that notice given May 23, 1892, of a fraud by the cashier discovered as early as March 2d—the day on which O'Brien left the receiver—was not as soon as practicable after the receiver acquired knowledge of the facts."

Unless the lapse of time is so long as to be obviously a non-compliance with the contract, the question is one for the jury. In May on Insurance, section 462, it is said:

"If the notice be required to be 'forthwith,' or 'as soon as possible,' or 'immediately,' it will meet the requirement, if given with due diligence under the circumstances of the case, and without unnecessary and unreasonable delay, of which the jury are ordinarily to be the judges. To give the word a literal interpretation would, in most cases, strip the insured of all hope of indemnity, and policies

of insurance would become practically engines of fraud. Thus notice within eight days after the fire, and within five days after it came to the knowledge of the insured, has been held to be reasonable. So, where the fire happened on the tenth, and notice of loss dated the eleventh, reached the insurers on the fifteenth of the same month. But a delay of four months in one case, of thirty-eight days in another, of twenty days in another, and of eleven days in another, there being no sufficient excuse therefor, has been held to be unreasonable. Yet where the insurers had, contrary to their agreement, refused to issue a policy, they were held to have waived their right to object to a notice sent eleven months after the loss. Whether due diligence has been used in giving the notice is a question which is ordinarily left to the jury, to be found from all the circumstances in the case. But where the facts and circumstances bearing upon the question of due diligence are not in dispute, it becomes a question of law for the court" (May on Insurance, 3d edition, section 462).

In Donahue *v.* Windsor County M. Fire Ins. Co., 56 Vermont, 374, notice of a fire was required to be given forthwith. It was held that such notice must be given with due diligence and within a reasonable time, and although notice was given twenty-two days after the fire, it was held a question for the jury as to whether it was
96 given forthwith. It was said by the Supreme Court, in the Pauley case, *supra*, that an indemnity contract is to be construed most favorably to the insured. In speaking of fire-insurance policies, under consideration in the Vermont case, *supra*, the judge said, page 380:

"The condition that the insured should give the company notice forthwith should be construed liberally in favor of the insured."

In People's M. Accident Ass'n *v.* G. W. Smith, 126 Pa. St., 317, Chief Justice Paxson, in delivering the opinion of the court—this being a case in which an injury was received by one holding an accident policy, on September 4, 1887, notice being given to the company October 19th, the policy requiring immediate notice of the injury—said:

"The word 'immediate,' in the contract, must be construed to mean within a reasonable time thereafter, under all the facts and circumstances of the case, and what is a reasonable time must be decided by the jury, unless, as before observed, the delay has been so great that the court may rule it as a question of law."

In Bennett *et al. v.* Lycoming Co. Mutual Ins. Co., 67 N. Y., 277, speaking of a case where the notice was required to be given forthwith, and it had not been given until twenty-six days after, Judge Earl said:

"The word 'forthwith' does not here mean immediately or instantaneously after the fire. It means, and has been held to mean, within a reasonable time or with reasonable diligence after the fire." N. Y. Cen. Ins. Co. *v.* Nat. Protection Co., 20 Bar., 468; Inman *v.* Western Fire Ins. Co., 12 Wend., 452.

The word "immediate" is certainly no stronger than the word "forthwith," or the expression "as soon as possible." In Ben. Frank

lin Ins. Co. *v.* Flynn, 98 Pa. St., 628, it was held that thirty days' delay will not prevent the submission of the question to a jury, in a policy which required proofs to be submitted as soon as possible. In McFarland *v.* U. S. Mut. Ac. Association, 124 Mo., 204, the supreme court of Missouri held:

"Where an accident policy requires 'immediate' notice of the death of the insured to be given, and provides that the same shall be given by letter, notice given within ten days after the death is sufficient.

"The word 'immediate' will, in such cases, be construed to mean 'within a reasonable time.'"

See also Continental Ins. Co. *v.* Lippold, 3 Neb., 391; Hamden *v.* Milwaukee Mechanics Ins. Co., 164 Mass., 382; Niagara Fire Ins. Co. *v.* Scammon, 100 Ill., 645.

97 Assuming that the defalcations were becoming apparent to the experts so that they began to discover them two or three weeks after the bank was closed, we cannot say, as a question of law, that such facts had been discovered as would justify a prudent man in charging another with dishonesty so as to require notice, and we think the question was properly left to the jury under the instructions given. Some cases have been cited in which it seems a more restricted view of this requirement is taken, but we think the opinion here expressed is more consonant with the intention of the parties and the purposes of indemnity contracts. In Bouvier's Law Dictionary it is said of the word "immediate":

"Strictly it implies not deferred by any lapse of time, but as usually employed, it is rather within reasonable time having due regard to the nature and circumstances of the case."

3. Nor do we think there is any reasonable objection to the form of the notice given. The purpose of the notice was to enable the indemnity company to terminate its liability and to obtain such remedies as it might see fit to adopt against the defaulter. The notice sent was general in its character. It advised the company of the default, claimed the full amount of indemnity, and no objection was taken to it.

4. It was further objected at the trial that the proof of claims, which was required by the bond to be made out as soon as practicable after the default, was not furnished in time. This claim was filed in July, 1897. During all that time the investigation was going on, and the books of the bank were being examined. So far as the testimony discloses, the full particulars of the claim were not developed until July so as to be capable of proof.

5. It is claimed the court erred in excluding a certain letter signed by Reutlinger, cashier, concerning McKnight's performance of his duties as president. The president of the Fidelity & Deposit Company, on the 15th of May, 1896, wrote the bank as follows:

"BALTIMORE, MD., *May* 15, 1896.

"To German National Bank, Louisville, Ky.:

"DEAR SIR: We hereby notify you that bond No. 50[illegible]2 for $10,000,

issued by this company on behalf of Jacob M. McKnight, in your employ as president, will expire on the 1st day of June next.

"The premium, forty dollars, should be paid on or before the date of expiration, otherwise the bond will lapse. Kindly have the certificate below filled in and signed, and forward with re-
98 mittance for premium to Jos. O. Odiorne, general agent, when the renewal receipt will be sent to you.

"Yours respectfully,

"EDWIN WARFIELD, *President.*"

The certificate referred to was filled in by the cashier, having been inclosed in blank form in the letter from the company, and was returned of date May 29, 1896, to the Fidelity Company, and is in the following language:

"The Fidelity & Deposit Company of Maryland:

"This is to certify that on the — day of ——, 189–, the books and accounts of Mr. J. M. McKnight, *is* president, in our employ, as—has no books and accounts were examined by us, and we found them correct in every respect, and all moneys handled by him accounted for.

"He has performed his duties in an acceptable and satisfactory manner, and we know of no reason why the guarantee bond should not be continued.

"His salary is now $4,500, and he is employed as president.

"Signature: R. E. REUTLINGER,

"*Cashier, Employer.*

"Dated at Louisville, Ky., May 29, 1896."

This certificate, signed by the cashier, was excluded because there was no showing that there had been special authority from the board of directors authorizing or directing the cashier to fill out and send it. It is earnestly argued that the cashier, by virtue of his office, and having charge of the correspondence of the bank, had full authority to answer this communication in the way which he did, and being in the apparent scope of his authority, the bank is bound by it. A majority of the court are of opinion that the case is ruled by Ins. Co. *v.* Pauley, *supra*, in which the president wrote a similar letter for the cashier, and it was held that the president of the bank, in the absence of express authority, could not bind the bank. There is no showing that the bank authorized the cashier to fill out the certificate and return it. It is not a case of answering a usual letter of the bank in the course of its business. A certificate as to the prior conduct of McKnight was inclosed, and an answer required. Nothing is shown in this case showing express authority, and we do not think such inheres in the duties of the office of cashier without special authority.

Other errors are assigned which either fall within the principles already laid down, or are not of sufficient weight to require further attention. Finding no error in the record of the proceedings in the court below, the judgment is affirmed.

99 United States Circuit Court of Appeals for the Sixth Circuit.

I, Frank O. Loveland, clerk of the United States circuit court of appeals for the sixth circuit, do hereby certify that the foregoing is a true and correct copy of the record in the case of The Fidelity & Deposit Co. of Maryland *vs.* R. H. Courtney, receiver of the German National Bank of Louisville, No. 751, October term, 189–, as the same remains upon the files and records of said United States circuit court of appeals for the sixth circuit, and of the whole thereof.

Seal United States Circuit Court of Appeals, Sixth Circuit,

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals for the sixth circuit, at the city of Cincinnati, Ohio, this fifth day of October, 1900.

FRANK O. LOVELAND,
Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.

100 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the sixth circuit, Greeting:

Being informed that there is now pending before you a suit in which the Fidelity and Deposit Company of Maryland is plaintiff in error and R. H. Courtney, receiver of the German National Bank of Louisville, is defendant in error, which suit was removed into the said circuit court of appeals by virtue of a writ of error to the circuit court of the United States for the district of Kentucky, and we being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and removed into the Supreme Court of the
101 United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 29th day of October, in the year of our Lord one thousand nine hundred.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

United States Circuit Court of Appeals, Sixth Circuit.

I return the above writ pursuant to a stipulation of counsel filed in this court this 3rd day of November, 1900, which is in the following words, to wit:

"Supreme Court of the United States, October Term, 1900.

FIDELITY & DEPOSIT COMPANY OF MARYLAND
vs.
R. H. COURTNEY, Receiver.
454.

It is stipulated between the parties to this cause that the certified copy of the transcript of record now on file with the clerk of the Supreme Court of the United States and which accompanied the petition for a writ of certiorari may be considered and treated as the record and proceedings in the said cause directed to be certified to the said Supreme Court, and this shall constitute a return to the writ.

ST. JOHN BOYLE &
EDWARD J. McDERMOTT,
Counsel for the Fidelity & Deposit Company of Maryland.
W. M. SMITH, *Att'y for Receiver.*"

Seal United States Circuit Court of Appeals, Sixth Circuit.

In witness whereof I have hereunto set my hand and the seal of the United States circuit court of appeals for the sixth circuit, at Cincinnati, Ohio, this 3rd day of November, 1900.

FRANK O. LOVELAND,
Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.

102 [Endorsed:] File No., 17,939. Supreme Court of the United States. No. 178, October term, 1901. The Fidelity & Deposit Co. of Maryland *vs.* R. H. Courtney, receiver. Writ of certiorari and return. Filed Nov. 5, 1900.

178

No. 454.

Br. of Boyle & McDermott for Pet'r

Supreme Court of the United States.

OCTOBER TERM, 1900.

Supreme Court U. S.
FILED
OCT 22 1900
JAMES H. McKENNEY,
Clerk.

Filed Oct. 22, 1900

THE FIDELITY & DEPOSIT COMPANY OF MARYLAND,
Petitioner,

VERSUS

R. H. COURTNEY, Receiver, etc,

Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

BRIEF IN SUPPORT OF THE PETITION.

ST. JOHN BOYLE,
EDWARD J. McDERMOTT,
Counsel for the Fidelity & Deposit Company of Maryland.

JOHN P. SMITH & CO., PRINTERS, LOUISVILLE, KY.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

THE FIDELITY & DEPOSIT COMPANY OF MARYLAND, PETITIONER,

VERSUS

R. H. COURTNEY, RECEIVER, ETC.

MOTION.

Now comes the Fidelity & Deposit Company of Maryland, by St. John Boyle and Edward J. McDermott, its counsel, and moves this Honorable Court that it shall by a writ of *certiorari* directed to the Honorable, the Judges of the United States Circuit Court of Appeals for the Sixth Circuit, require said Court to certify to this Court for its review and determination a certain cause in said Court of Appeals lately pending, wherein the Fidelity & Deposit Company of Maryland was plaintiff in error and R. H. Courtney, Receiver, etc., of Louisville, Kentucky, was defendant in error; and to that end now tenders herewith its petition, together with a certified copy of the entire record in said cause in said Circuit Court of Appeals.

ST. JOHN BOYLE,
EDWARD J. MCDERMOTT,
Counsel for the Fidelity & Deposit Company of Maryland.

Notice of the foregoing motion is hereby accepted this 17th day of October, 1900.

W. J. COOK, *successor to* R. H. COURTNEY, *Receiver*,

By WM. SMITH, *Counsel.*

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1900.

THE FIDELITY AND DEPOSIT COMPANY OF MARYLAND

VERSUS

R. H. COURTNEY, RECEIVER OF THE GERMAN NATIONAL BANK, OF LOUISVILLE.

PETITION OF THE FIDELITY AND DEPOSIT COMPANY OF MARYLAND FOR A WRIT OF CERTIORARI REQUIRING THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT TO CERTIFY TO THE SUPREME COURT OF THE UNITED STATES THE APPEAL TAKEN BY THE SAID FIDELITY AND DEPOSIT COMPANY OF MARYLAND AGAINST THE SAID R. H. COURTNEY, RECEIVER.

To the Honorable, the Chief Justice and Associated Justices of the Supreme Court of the United States:

The petition of the Fidelity & Deposit Company of Maryland respectfully represents as follows:

First. Your petitioner is a corporation of the State of Maryland. The respondent to the petition, R. H. Courtney, is Receiver of the German National Bank, of Louisville, which bank was organized under the laws of the United States in relation thereto, and the said Courtney was duly appointed receiver thereof by the Comptroller of the Treasury.

Second. On February 5, 1898, R. H. Courtney, Receiver, began an action at law in the United States Circuit Court for

the District of Kentucky against the petitioner, the Fidelity & Deposit Company of Maryland, upon a bond. This bond was one executed by the Fidelity & Deposit Company as surety for the performance of the duties of one J. M. McKnight, first as Vice-President and then as President of the German National Bank of Louisville. The defendant in that action answered, and there was a trial by jury and a verdict and judgment for the plaintiff for the amount of the bond, $10,000.

Third. It appears that a short time prior to June 1, 1894, J. M. McKnight was made Vice-President of the German National Bank, with Adolph Reutlinger as President and a director, and his son, Rudolph Reutlinger, as cashier and teller. On June 1, 1894, the said McKnight executed a bond in the sum of $10,000, with the Fidelity & Deposit Company as his surety, conditioned for the faithful performance of his duties as such Vice-President. On January 1, 1895, McKnight became President, and A. Reutlinger, the former President, became Vice-President, with a salary of $1,500 per year for constant attendance at the bank. This bond was renewed for McKnight as President for one year on June 1, 1895, and was renewed for another year on June 1, 1896.

On January 18, 1897, the Comptroller of the Currency closed the German National Bank, and a few days thereafter appointed R. H. Courtney, Receiver, and McKnight was arrested on January 19, 1897. The said Receiver brought this action February 5, 1898, to recover the amount of the bond, charging that McKnight was a defaulter in the sum of $18,742.74. Some of the items contained in the account were abandoned by the Receiver at the trial, but more than $10,000 of items were still claimed.

Fourth. The defense was a denial of the defaults, and, in addition, the Company set up provisions in the bond which, it was claimed, were not regarded by the bank, and the disregard of which by the bank operated to discharge the obligation of the bond.

Fifth. The bond itself was lost or mislaid, but was contained in a printed form, the important parts of which are as follows:

"Bond No. ———

"Fidelity & Deposit Company of Maryland.

"Home Office: Baltimore, Md.

"Amount, $——— Annual Premium, $———

"Know All Men by These Presents:

"That ——— (hereinafter called the 'Employee'), and the Fidelity & Deposit Company of Maryland (hereinafter called the 'Company') are held and firmly bound unto ——— (hereinafter called the 'Employer') in the sum of ——— dollars, lawful money of the United States of America, to be paid to the said employer, his or their certain attorney, executors, administrators, assigns or successors, to which payment well and truly to be made, we and each of us do bind ourselves, respectively, and our respective heirs, executors, administrators, and successors, jointly and severally, firmly by these presents.

"Sealed with our seals, and dated the ——— day of ——— Anno Domini one thousand eight hundred and ninety——."

"Whereas, The Employee has been appointed in the service of the Employer, and has been assigned to the office or position of ——— by the Employer, and application has been made to the Fidelity & Deposit Company of Maryland for this bond;

"And, Whereas, The said Employer has delivered to the Company a certain statement, and it being agreed and understood that such statement constitutes an essential part of the contract hereinafter expressed:

"Now, therefore, in consideration of the payment of the sum of ——— dollars, lawful money of the United States of America, to the Company as a premium for the term commencing at the date hereof and ending on the ——— day of ——— eighteen hundred and ninety ———, at 12 o'clock, noon, the Company does hereby agree that it will, within three months after receipt of proof satisfactory to its directors, and subject to the conditions hereinafter expressed, reimburse the Employer to an amount not in excess of the penalty of this bond, for such pecuniary loss as the Employer shall have sustained by any fraudulent act or acts committed by the Employee during the continuance of this bond, in the performance of the duties of his said office or position, or of such other position as he may be subsequently appointed to or called upon to fill by the Employer in said service, of money, securities or other personal property belonging to the Employer, or for which the Employer is responsible.

"This bond may be continued from year to year, at the option of the employer, at the same or an agreed premium rate, so long as the Company shall consent to receive same, in which case the Company shall remain liable for any dishonest act of the Employee occurring between the original date of this bond and the time to which it shall have been continued.

"This bond is issued and continued upon and subject to the following conditions and provisions:

"That the actual payment of the premium and its acceptance by the Company, for either the issue or continuance of this bond, is essential to its currency, and a condition precedent to a right to claim hereunder.

"That the Employer shall immediately give the Company notice in writing of the discovery of any default or loss hereunder, and shall file with the Company his or their claim hereunder, with full particulars thereof, as soon as practicable thereafter, and no claim which shall not be so filed by the Employer with the Company within six months after the expiration or cancellation of this bond, or within six months after the Employee shall have ceased to be in the Employer's service, shall be payable hereunder.

"That if the Employee leave the service of the Employer during the currency of this bond, for any cause whatever, the bond shall thereon expire, and the Company shall be notified in writing by the Employer, and the amount of unearned premium shall be refundable to the Employer on application, and no claim which shall not have been made on the Company within six months after the Employee leaves the service, during such currency, shall be valid or recoverable hereunder.

"That upon notification to the Company of any loss hereunder, the Company's liability shall thereupon terminate as regards any subsequent act of the Employee.

"That the Employer shall observe, or cause to be observed, due and customary supervision over the Employee for the prevention of default; and if the Employer shall at any time during the currency of this bond condone any act or default on the part of the Employee which would give the Employer the right to claim hereunder, and shall continue to the Employee in its service without written notification to the Company, the Company shall not be responsible hereunder for any default of the Employee which may occur subsequent to such act, or default so condoned.

"That the Employee shall not be required or permitted to perform permanently the duties of a dual capacity in the service of the Employer which would admit of the possi-

bility of fraud by false entries and absence of check by another officer.

"That there shall be a complete inspection of the accounts and books of the Employee on behalf of the Employer at least once in every twelve months from the date of this bond, such inspection to include examination of all cash and securities of which the Employee shall have custody or charge.

"That the Employee has not, within the knowledge of the Employer, been at any time in arrears or default in either this or other employment.

"That the Employer shall at once notify the Company on becoming aware of the Employee being engaged in speculation or gambling, or indulging in any disreputable or unlawful habits or pursuits.

"That if the Employer shall at any time hold concurrently with this bond any other bond or guarantee or security from or on behalf of the Employee, the Employer shall be entitled, in the event of loss by default of the Employee, to claim hereunder only such proportion of the loss as the amount covered by this bond bears to the whole amount of security carried on the Employee's behalf.

"That the Company may, upon giving one month's notice in writing to the Employer, cancel its responsibility hereunder, in so far as concerns the acts or defaults of the Employee subsequent to the end of such month; in which event it will, upon request of the employer, refund the proportion of the premium paid for the unexpired term of this bond.

———— Employee.
———— President."

Sixth. Shortly before the renewal of McKnight's bond on June 1, 1896, the Fidelity & Deposit Company wrote the following letter to *the bank*, and received the following answer from the cashier:

"Security Department. No. 5002. Bond Division.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND,
Home Office, Baltimore, Maryland.

BALTIMORE, May 15, 1896.

"To GERMAN NAT'L BANK,
Louisville, Ky.

"Dear Sir: We hereby notify you that Bond No. 5002 for $10,000, issued by this Company on behalf of Jacob M. McKnight, in your employ as President, will expire on the 1st day of June next.

"The premium, $40.00, should be paid on or before the

date of expiration, otherwise the bond will lapse. Kindly have the certificate below filled in and signed, and forward with remittance for premium to Jos. S. Odiorne, Gen'l Agent, when the renewal receipt will be sent to you.

Yours respectfully,
EDWIN WARFIELD,
President."

"To Fidelity and Deposit Company of Maryland:

"This is to certify, That on the ——— day of ———, 189—, the books and accounts of Mr. J. M. McKnight, is President, in our employ, as has no books and accounts were examined by us, and we found them correct in every respect and all moneys handled by him accounted for.

"He has performed his duties in an acceptable and satisfactory manner, and we know of no reason why the guarantee bond should not be continued.

"His salary is now $4,500.00, and he is employed as President.

"Signature,
"R. E. Reutlinger, Cash.,
"Employer.

"Dated at Louisville, Ky., May 29, 1896.

"To Employer—Notice of Expiration."

When these letters were offered in evidence, the Court refused to allow them to be read to the jury, being of opinion that the cashier had no power, by reason of his office, to make the statement that the books and accounts had been examined and found correct, and the moneys accounted for. If this letter from the cashier did bind the bank, then the renewal of the bond was obtained by a false representation of the cashier, and which he knew was false.

In the Circuit Court of Appeals the judges disagreed upon this point, a majority being of opinion that the case was ruled by American Surety Co. v. Pauly, 170 U. S. 133–160, in which the President, when a bond was first applied for, wrote a letter of recommendation for the cashier, and it was held that the President had no authority by virtue of his office to bind the bank by such statements.

It is respectfully submitted that the majority of the Court wrongly applied the decision in American Surety Co. v. Pauly; and the decision in that case, that the President had no such

authority, is not a decision that the Cashier has not, especially when a letter of inquiry had been duly addressed to *the bank* by the surety and the Cashier replied in due course and seemingly with authority. The duties and powers of a President and Cashier are essentially different, and it is conceived that, under the circumstances of the division of the Court upon a question which is more or less vital in suits of this character, it should be conclusively settled by the Supreme Court, so that no misapprehension may be had of its previous decision.

Seventh. The defaults of McKnight which formed part of the verdict are substantially as follows:

(*a*) The mayor of the city of Louisville having died, McKnight became a candidate for the vacancy, which was to be filled by the City Council. His opponent was one George D. Todd. The manager of Mr. McKnight's race was one S. E. Edmunds, who came frequently to the bank to consult about the canvass, and who had conversations with the Vice-President and cashier, and, as the Bill of Exceptions states, they "knew the purposes of his visits." This was in January, 1896. The City Council was composed of twelve aldermen and twenty-four councilmen, and among the members were Jenne, Sowders, Glover, and Adams. They demanded of Edmunds $1,000 before they would agree to vote for McKnight. McKnight at the critical time of the canvass thereupon directed the cashier (who was also teller of the bank) to take $1,000 to another bank and get for Edmunds ten bills of $100 each, which the cashier did, and delivered the same to Edmunds. The money was divided among the four members, who signed the following agreement:

> "I hereby pledge myself to vote for J. M. McKnight for Mayor of the City of Louisville, first, last, and all the time, until elected or defeated before the General Council."

Edmunds, who was himself in need, and who had no money in the bank, gave his individual check for the money, and the money was never paid to the bank. There was evidence sufficient to show that the active officers of the bank, and indeed all of the directors, must necessarily have known that McKnight

was a candidate for the office; that it was a matter of general notoriety and was discussed in the newspapers, and those that knew of the affairs of the bank, or paid the attention that their duties called for, must have known of the transaction. The Vice-President and the cashier both knew of it, though both deny that they knew that the money was to be used in such a manner.

(*b*) McKnight, however, was defeated for the office, whereupon a great dissension arose between Mayor Todd and the City Council. Seven of the Board of Aldermen, constituting a majority, were opposed to the mayor and his measures. For some purpose not disclosed, McKnight sought to control this majority, but two of the aldermen, Messrs. Britt and Reeder, wavered in their loyalty. Edmunds, political manager for McKnight, acted as the negotiator in this transaction also; whereupon McKnight told the cashier that he had "a big scheme on hand"; requested him to keep the bank open on February 6, 1896, until after dark. Whereupon, about 6:30 P. M., Edmunds, with Britt and Reeder, appeared at the bank. Edmunds prepared a note for $2,000, payable in one year without interest, and then Britt and Reeder signed it and then went up stairs, and, after they had signed the agreement following, they came back to the cashier, and he then paid them, by direction of McKnight, $2,000 without deducting or receiving any money for interest. The note reads as follows:

"Louisville, Ky., Feb. 6, 1896.

"$2,000.00.

"One year after date we promise to pay to the order of ourselves two thousand dollars without defalcation, value received, negotiable and payable at the German National Bank.

"F. A. Britt,
"John W. Reeder.

"Indorsed:
"F. A. Britt, John W. Reeder."

Edmunds borrowed from Britt and Reeder $225.00 of the money inside the bank. Whereupon the seven aldermen, including Britt and Reeder, executed the following agreement:

"LOUISVILLE, KY., February 5, 1896.

"We do this day and date agree with one another, and bind ourselves on our sacred words and honor, that we will stand together on any and all propositions of legislation that may come before the body of which we are members, namely, the Board of Aldermen of the City of Louisville; that we will so caucus with our friend J. M. McKnight, and act wisely, and secure for our friends an equal division of the offices and any profit that may arise therefrom; that we, as men and members of the Upper Board, will not allow the Mayor to force upon us any appointments that we do not deem wise and to our interest, and in so doing will not act the first night of the meeting on any proposition sent in by the Mayor, but will take one week for consideration and caucus.

"Now we have calmly considered the above, and do again pledge ourselves one to the other before subscribing our names this day and date, Feb. 5, 1896, in the presence of one and the other. C. J. Jenne, J. E. Leatherman, R. E. King, R. O. Breuner, J. D. Trick, F. A. Britt, John W. Reeder."

This transaction was certainly known to the cashier, and that night at 9 o'clock he went to the house of his father, Vice-President and director, to tell him about it, and it thus became known to the Vice-President and one or more of the directors, and the Vice-President asked an explanation of this extraordinary transaction of the President next day, and was so dissatisfied that he brought the matter up before the Board of Directors, who were satisfied with McKnight's assurance that he would have the note secured or would pay it himself, though no explanation was made why the money was lent for a year without interest. Britt and Reeder were men without property, and the note was not discounted and *bore no interest.*

(*c*) On January 1, 1896, McKnight drew his check upon the bank for $1,253.00 in payment of a claim in the hands of attorneys against him. This check, at McKnight's request, was carried by the cashier as a cash item from January 21 until March 12, 1896, when it was charged to the account of S. E. Edmunds & Co., in which McKnight had an interest, but which account resulted in a loss to the bank.

On March 12, 1896, he drew another check for $1,650.00 for

the same purpose, and this was charged to an account called the "Louisville Deposit Collateral Account," in which McKnight, as the cashier knew, had no interest, but was an account belonging to the bank itself.

(*d*) On June 6, 1896, McKnight drew a check for $3,736.60 in payment of a private debt, and charged it to the account of "E. G. Williams, Special." The said Williams was a broker in whisky, and was employed by the bank to sell whisky owned by it; and the account belonged to the bank, and McKnight had no interest therein, as the Cashier knew.

(*e*) McKnight was also overdrawn, and he seems to have been habitually overdrawn to a large amount. Other items suffice to make McKnight's defaults exceed the amount of his bond.

Eighth. On these facts it was claimed in behalf of the surety on his bond that it had been released from liability under the following clauses:

> "That the Employer shall observe, or cause to be observed, due and customary supervision over the Employee for the prevention of default; and if the Employer shall at any time during the currency of this bond condone any act or default on the part of the Employee which would give the Employer the right to claim hereunder and shall continue to the Employee in its service without written notification to the Company, the Company shall not be responsible hereunder for any default of the Employee which may occur subsequent to such act, or default so condoned.
>
> . . . . . .
>
> "That the Employee has not, within the knowledge of the Employer, been at any time in arrears or default in either this or other employment."

As there was evidence tending to show a want of due and customary supervision required by the terms of the bond, and as there was also evidence of gross carelessness and neglect on the part of the other officers and directors of the bank, the Court's instructions to the jury evidently confused their minds on the subject. The Court observed:

"What is due and customary supervision is something that has not been made very clear by the evidence in making out this defense. I don't know that it has been made clear to the jury any more than it has to the court as to what is the customary supervision that is meant, or what is the due supervision that is meant."

Nor did the Court ever define what was meant by the expression of due and customary supervision. The case was submitted to the jury on May 2d, but no verdict was reached on that day. On the subsequent day, after deliberation, the jury requested the Court to further instruct them, and propounded in writing this inquiry:

"If the jury agree that the directors of the bank were careless in the management of the bank, shall the jury find for the defendant?"

To this inquiry the Court responded:

"Gentlemen of the jury, no such issue as that stated in this question was presented. The mere question of whether or not the directors generally were careless in their management of the bank is not a question for your consideration, nor would it exempt the defendant from the obligation imposed by the bond sued on. You have already been instructed as to the meaning and effect of the condition of the bond as to due and customary supervision, and outside of that there is no provision as to carelessness."

This was objected to as misleading, and it served the purpose of impressing upon the jury that no carelessness could be a want of due and customary supervision. Undoubtedly the jury asked for an instruction on this point in order to have it explained to them how far carelessness would amount to want of such supervision. The jury were evidently misled by the expression of the Court, and the entire instruction to the jury on the subject was erroneous, because it contained no reference to the effect on the question of supervision which should be given to the conduct of the officers who had knowledge of the transactions of McKnight.

Ninth. Upon this question of the knowledge of the cashier, the Court instructed the jury as follows:

> "I do not think that the knowledge of a cashier of a bank, speaking generally, is the knowledge of the bank as to any matter that does not come within the customary or ordinary duties of a cashier or those which have been specially imposed upon him by the action of the bank. I do not think Mr. R. E. Reutlinger in this case, in respect to any matter which he knew or could do, represented the bank, if it was outside of his ordinary duties; and I do not recall any thing that he knew, so far as the proof shows, that would in any wise affect the liability of the defendant in this case."

The cashier, Mr. R. E. Reutlinger, knew of all the transactions of McKnight, and they came to him in the course of his ordinary duties as such cashier and in no other way, and it was his duty to convey the information to the directors of the bank. Yet the Court said:

> "I do not recall any thing that he knew, so far as the proof shows, that would in any wise affect the liability of the defendant in this case."

Tenth. The Court further instructed the jury:

> "If you believe from the evidence that this transaction was known and condoned by *the bank* at the time, before these other transactions occurred, then the defendant in this case is not liable. But if you believe, on the contrary, that *the bank* did not know it, that it was the fraudulent act of McKnight alone, not participated in by the bank—when I say the bank, I mean the bank, I do not mean any individual director—then the defendant is liable."

The evidence in the case showed that the Vice-President, who was a salaried officer and a director and in constant attendance at the bank, and at least one other director, Mr. Reisch, knew of the extraordinary transaction of McKnight with Britt and Reeder, and the object of the transaction. It was even brought before the board of directors itself. It is submitted that if, in such case, notice to other officers and one or more directors is not notice to the bank, then the only conclusion that can be arrived at is, that there must be a definite formal communication to the entire board, or to the board in session, before notice can be imputed to the bank.

Eleventh. Another ground of defense arose out of a clause in the bond which is as follows:

> "That the Employer (1) shall *immediately* give the Company notice in writing of the discovery of any default or loss hereunder, and (2) shall file with the Company his or their claim hereunder, with full particulars thereof, as soon as practicable thereafter, and (3) no claim which shall not be so filed by the Employer with the Company within six months after the expiration or cancellation of this bond, or within six months after the Employee shall have ceased to be in the employer's service, shall be payable hereunder."

R. H. Courtney was appointed Receiver of the bank on the 18th of January, 1897, and began the performance of his duties January 22, 1897. McKnight was arrested January 19, 1897. The Receiver said: "Almost immediately after the bank passed into my hands as receiver, I began to ascertain the defalcations. . . . It was almost immediately after the bank closed that these defalcations became known; not all of them, but enough to ground the claim upon." The Bank Examiner said he discovered defaults in two weeks after the bank closed, January 18th. Hence he discovered them by the 1st or 2d of February. No notice was given to the Fidelity & Deposit Company of McKnight's default until thirty days after the bank closed, or on February 18, 1897, when the Receiver wrote the following letter:

"J. M. McKnight, President. H. H. Rademaker, Vice-President.
R. E. Reutlinger, Cashier.
German National Bank.

"Louisville, Ky., February 18, 1897.

"To the Fidelity & Deposit Company of Maryland, Baltimore, Md. Gentlemen: Referring to the certificate No. 4043, issued from your security department, guaranteeing the fidelity of Jacob M. McKnight, President of the German National Bank, under your bond to him, No. 5002, issued June 1, 1894, in favor of such bank, we hereby notify you that said Jacob M. McKnight, as President, has been found in default to this bank, and that you will be required to make an indemnity to me as Receiver to the extent of said bond. Yours truly,

"R. H. Courtney,
"Receiver German National Bank."

No further notice was given, and no claim filed until July 3d thereafter, a delay of five months after defaults were first discovered.

On the contrary, the Receiver, though he had obtained information of specific defaults, not only did not communicate the facts to the Company, but on March 6, 1897, brought a suit in the Jefferson Circuit Court against McKnight upon these defaults, which were made the subject afterward of the claim and suit against the surety. In that suit he sued out an attachment against the property of McKnight; and, on the trial of the present case, the Court instructed the jury that no effect should be given to this fact. The Court's instructions upon this point affirmed that the indefinite notice of February 18th was a sufficient notice under the contract, and that the filing of a claim on July 3d, though the particulars were known to the Receiver nearly four months before, was a sufficient compliance with that provision of the contract requiring the particulars to be furnished to the Company "as soon as practicable." In the American Surety Co. v. Pauly, 170 U. S. 146, the claim was filed in thirty-one days after the notice was given.

Twelfth. Recently, and during the last term of the Supreme Court, in the case of the Guarantee Co. of North America v. The Mechanics' Savings Bank & Trust Co., upon the petition of the complainant, a writ of certiorari was granted to the Circuit Court of Appeals for the Sixth Circuit to certify that case to the Supreme Court for review. It will be observed that that case was decided by the same Circuit Court of Appeals as the present one.

The controversy in that case arose upon a bond given by a bank cashier which was similar in its provisions to the one involved in this litigation. The interpretation and effect of some of the same provisions of the bond are in question in that case as in this. The principles which are to govern in the decision of that controversy are largely the same as those which have been raised in the present suit. Both cases involve the same general questions, which will determine the relation which the paid sureties on the present forms of official bonds bear to the

obligee. How far they may be governed by the ordinary laws of suretyship, how far by the laws which govern policies of insurance, and whether their relations are to be likened unto those of insurers against fire, etc., or those of life, what is "due and customary supervision," what is notice to one officer or director of another officer's defaults or wrongdoing, what suspicious circumstances are sufficient to put officers or directors upon inquiry, and how far they must pursue their investigations and when they must communicate to the surety what they have learned—all these are questions more or less involved in the controversy in both cases. Under these circumstances, it is submitted that this case ought to be also certified to be heard with the one already certified to the Court.

Thirteenth. For these reasons your petitioner respectfully prays that a writ of certiorari may be issued directed to the United States Circuit Court of Appeals for the Sixth Circuit, commanding said Court to certify and send to this Court, on a day to be fixed, a full and complete transcript of the record and the proceedings of the said Circuit Court of Appeals in the case of the Fidelity & Deposit Company of Maryland v. R. H. Courtney, Receiver, to the end that the said case may be reviewed and determined by this Court, as provided by law, and that your petitioner may have such other and further relief in the premises as the Court may deem just and proper.

ST. JOHN BOYLE,
EDWARD J. MCDERMOTT,
Counsel.

STATE OF KENTUCKY, }
JEFFERSON COUNTY. }

Willis S. Mullin, being first duly sworn, says that he is the General Agent of the petitioner, the Fidelity & Deposit Company of Maryland, for the State of Kentucky, and as such has been engaged in the case mentioned in the foregoing petition; that he has read the foregoing petition, and that the facts therein stated are true to the best of his information and belief.

_____.

Subscribed and sworn to before me, this ——— day of ———, 1900.

_____.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

THE FIDELITY & DEPOSIT COMPANY OF MARYLAND, PETITIONER,

VERSUS

R. H. COURTNEY, RECEIVER, ETC.

BRIEF IN SUPPORT OF THE APPLICATION FOR A WRIT OF CERTIORARI.

The questions involved in this case touch the life of bond-companies, and go to the root of the law of suretyship as applied to them. If the decision in this case be allowed to stand, there can rarely be a defense to an action against a Bond Company as a surety. The law of suretyship will be revolutionized; and, in spite of contract rights, to go on a bond will mean in most cases to pay all losses, no matter how unfair, negligent, or reckless the persons getting the bond may be. The result will be that the premiums for bonds must become higher or the companies must quit business. The loss in the end will fall on employers of ordinary care and honesty who do not need, and do not ask, to be protected against their own bad faith, gross neglect, or gross folly.

Several of the most important questions involved in this case are also directly presented in the case of the Guarantee Company of North America v. The Mechanics Savings Bank & Trust Company, in which case a writ of certiorari to the Circuit Court of Appeals for the same Circuit has been twice granted by this Court, once at the October term of this Court in 1897 and finally

at the last term of this Court a few months ago. The main questions involved in that case are the same as several important questions in this. In both cases the Court must decide what is "due and customary supervision" over an officer in a bank, what notice to a surety of an officer's misconduct good faith requires, and how far knowledge of one officer or director is to be treated as knowledge of the bank or the Board of Directors. The true meaning of the American Surety Company v. Pauly, 170 U. S. 160, must be made clear or the law of guaranty and suretyship will be greatly and unwisely altered. According to the principles of that case, the petitioner in this case should have been exonerated. In spite of a strongly adverse charge in the Circuit Court; in spite of the natural prejudice of a jury against a corporation like a Bond Company, the jury evidently wanted to find a verdict for the surety; because the jury were long hung and, on the second day, would not find for the complainant without asking for a further charge; and the second charge was so strong against us that they evidently felt that there was nothing else to do but find a verdict for the complainant, even though it were not consonant with their own ideas of justice.

In the argument in the Circuit Court of Appeals the question came up whether the rights of a bond company as a surety were different in any respect from the rights of an individual bound as a surety. Only one difference has been or can be logically made. It has properly been held that where the construction of the contract of the surety company is doubtful, it will be construed against the surety, because such a contract is prepared by skillful attorneys of the surety company, and, in such a case, surety companies will be treated as insurance companies are treated; but a surety company, like anybody else, has a right to limit its liability by contract, and, when the contract is clear, it must be enforced. It can not be ignored or brushed aside merely because the contract was made for a consideration. All contracts are based upon a consideration, and, except in ascertaining what the meaning of the contract is, no distinction can be drawn

between the contract of an individual surety and the contract of a corporation surety. The essential contract rights of corporations and individuals, under like circumstances, must be the same wherever impartial courts enforce the law. In the case at bar it is not pretended that there is any ambiguity in the contract. The meaning is clear, and the only question is whether this clear contract shall be reasonably and fairly enforced. We are only asking that facts, which would have exonerated a private surety without compensation under all former decisions, shall also exonerate the Fidelity & Deposit Company, which went on the bond for a small fee. We only ask that we shall be held entitled to the same good faith and the same notice that any private surety would have been entitled to, and without which the surety would have been released. All this should be made plain by the Supreme Court for the guidance of the bond companies and the courts.

In times past courts, in determining the rights of private persons who have become bound as sureties, have not sought to ascertain whether the surety became bound for a good or a valuable consideration, nor to whom nor from whom the consideration moved. Whether a surety signed for money or on account of friendship was not inquired into, and made no difference in his rights, and would make no difference in his rights to-day. The courts have never attempted to make distinctions between valuable considerations in any form of contracts, and whether the Fidelity & Deposit Company was or was not paid to sign McKnight's bond can not be considered in this case. Bond companies serve a useful purpose. They are in their infancy. Unless their premiums are increased, it is doubtful whether many of them can live. The percentage of loss would be enormous if employers could be negligent or reckless and yet hold the surety for embezzlements that could be prevented by ordinary care. The desire or demand on the part of the public for suretyship or guarantyship by corporations rather than by private individuals is steadily increasing, and surely the courts should do nothing to

prevent the gratification of such a reasonable desire. The competition between the companies, of which there are now a great many, will inevitably reduce the cost of the premium in each case to the lowest point consistent with reasonable profit. The action of competition in this way can be relied on with perfect confidence. Hence, in a short time, the premium will become so small that it will merely cover the risk of loss, when there has been reasonable care on the part of the employer to prevent loss. If the courts, however, lay down all the bars and say that the surety must pay, practically in every case, no matter how gross the carelessness or negligence of the employer may be, these companies must either go out of existence or the rate of insurance or premium must become so high that it will be a great burden upon the people of ordinary honesty and reasonable diligence. It would be highly inequitable and unwise to make such suretyship too expensive for diligent and business-like men, in order that there might be absolute protection for those who are totally negligent and unbusiness-like, and who invite, by their want of care and good sense, the defalcations of their employes.

It is not contended that employers must use such care and intelligence as will render defaults almost impossible or very rare. It is only contended that it is for the benefit of everybody but the incompetent or the slothful that employers who take bonds must still show reasonable attention and diligence in guarding against the defaults of their servants; and that sureties, whether private individuals or corporations, shall be treated with candor and fairness. To allow reckless employers to hold sureties in nearly all cases will encourage fraud and crime—will multiply temptations to unwatched employes and increase the cost of a surety to thrifty and conscientious employers. *Et ne nos inducas in tentationem.*

FIRST POINT.

The knowledge of Directors Reutlinger and Reisch of McKnight's defaults bound the Bank, but we understand the decision of the lower court to greatly restrict, if it does not nullify, the rule that the knowledge of a director acquired in the business of the Bank is generally the knowledge of the Bank.

In this case the complainants have recovered judgment against the surety for several defaults, but the first in time was a payment of $1,000 by the Cashier of the bank to S. E. Edmunds, the political manager of McKnight, in ten one-hundred dollar bills on January 21, 1896, on the order of McKnight, who became a candidate for mayor of the City of Louisville before the General Council thereof a few days after the death of the Hon. Henry S. Tyler on January 14, 1896. With that $1,000.00 S. E. Edmunds bought four councilmen and got from them a written pledge to vote for McKnight. A race for mayor in a big city like Louisville was of course a subject of profound interest and earnest discussion to everybody in the city, including, of course, the officers and directors and clerks of the bank, whose President was a candidate. (R. 46.) A few days after January 14, 1896, McKnight became a candidate, and a few days after he became a candidate, to wit, January 18, 1896, he was overdrawn in bank $1,340.12. On January 20, 1896, he was overdrawn $1,460.14. On January 21, 1896, he told his Cashier to give his well-known political manager, Edmunds, who was in constant conferences about the election at the Bank itself, $1,000.00 in ten one-hundred dollar bills. (R. 44.) He was particular to have ten bills of $100.00 each. Nothing else would do. The Cashier, who was also teller, did not have ten bills of $100.00 each. McKnight sent him out to another bank on that peculiar mission, to get that special kind of money. The Vice-President, who was the father of the Cashier and a director (R. 44.), heard the President send the Cashier and teller out to

get the money in that strange way for the political boss whose headquarters seemed to be in the Bank during this exciting race; and the money was paid to the boss on his own check, when he had no money in bank and was himself in need. By the order of McKnight that check was held up by the Cashier as cash in his drawer from January 21, 1896, to March 12, 1896, seven weeks (R. 43.); and then it was charged, not to the man who got the money and who gave his individual check for it, but to S. E. Edmunds & Company, in which McKnight was a partner.

On that same 21st day of January, 1896, when McKnight was overdrawn in a large sum, he gave another check of $1,253.00 to some Louisville lawyers to pay a private claim against himself, and that check, too, at his request, was held up by the Cashier for seven weeks in his cash drawer as cash, and was not charged to anybody till March 12, 1896, and then it was charged to S. E. Edmunds & Company (R. 47). The Vice-President and director saw that this check also was being held up in this improper way by his son, and was told by the Cashier that this was being done by order of McKnight.

It can easily be understood why the officers and directors of a bank on the verge of bankruptcy might want its President to become mayor of the city and, by means of city deposits and political patronage, get the Bank a new lease on life, and why the officers in desperate straits might connive at corruption, if they did not directly aid in it, to secure his election, and why they might later conveniently forget or pretend to misunderstand the plainest features of the transaction.

A few days after McKnight's political manager had bought the four councilmen with the ten one-hundred-dollar bills, McKnight was beaten for Mayor by Mr. George D. Todd; and there was great dissension between McKnight's gang and the successful candidate's supporters. McKnight, out of spite or because he hoped to get political patronage that would pay him and the bank, organized an opposition party; and, to block the measures of the successful mayor and to control municipal affairs,

he needed seven of the twelve aldermen. He could count on five and must buy two more. Britt and Reeder were willing to sell. Edmunds was used to buy them. McKnight, on February 6, 1896, about two weeks after the purchase of the four councilmen, Jenne, Sowders, Glover, and Adams, and a few days after the election, told the Cashier and teller to keep the bank open that evening after banking hours; "that he had a big scheme on hand, and that it was a big thing" (R. 45), not that it was merely to lend a little money of the Bank in a legitimate way. At 6:30 P. M. Edmunds appeared at the Bank with two aldermen—Britt and Reeder, who had no property. Edmunds wrote out a note for $2,000.00, which was not to bear interest for a year—wrote it out in the presence of the Cashier and McKnight. But the money was not given to them at once. They must first do something else to get the money (R. 45). They went up stairs over the bank where "the gang," the other five aldermen, were waiting for them, and there they and the five other aldermen signed a written agreement to the effect that McKnight should be their political boss and that they would only vote after consulting him. Meanwhile the Cashier was waiting for Britt and Reeder to come down for their money. They came down, and then they were allowed to get their hands on the money, no interest being deducted in advance. Immediately, in the Bank, Edmunds demanded his part of the corruption fund, and they gave him $225.00.

At 9:30 o'clock that same evening the cashier ran to his father's house to tell him, the Vice-President and the director, of this strange business. The next morning the Vice-President called for an explanation from the President. The President said the note was good, and that it *would* be guaranteed by two sureties, whom he named, but they never did give the guaranty. He did not explain why $2,000 of the Bank's money was being lent for a year without interest. In the same conversation, McKnight (R. 46), who "had a long yellow envelope in his hand" (containing, of course, the corrupt pledge), told the Vice-President that

"those fellows (the Aldermen known, of course, to the Vice-President and his son) had signed it, and that he would not sign that for the city of Louisville;" that "he had a meeting up stairs (while the Cashier was waiting, and of which, of course, he must have known) and that paper was signed, and he would not sign it for the city of Louisville." The language of the President could leave no doubt in any sane man's mind what he meant. To suppose that a man who had had sense enough to be President and Vice-President of a National Bank in a big city for about twenty years did not have sense enough to know that a corrupt deal had been made, and that a lot of rascals had signed an incriminating and disgraceful paper, would be unreasonable.

The Vice-President testified that he was not satisfied with the explanation of the President; and, being really unfriendly to the President, he brought the matter before the board and told them that he had examined into the condition of the two aldermen who had gotten two thousand dollars of the Bank's money under such suspicious and questionable circumstances, and that they had no property; that they were insolvent. McKnight then came before the board of directors and said that the note *would* be guaranteed by two sureties (who never did so); and that, if not, he (then heavily overdrawn and having the Cashier hold up checks for him to the amount of at least $2,253.00 as cash items in the cash drawer) would pay it himself. The directors, so child-like and bland, were satisfied. Any thing satisfied them.

All the foregoing circumstantial evidence was proven by the witnesses of complainants. No witnesses were called for the defendant. As to all these matters, there was no contrariety of evidence, excepting that the Cashier, to clear himself, said that he never understood what any of these queer things meant, and excepting that his father, the Vice-President, to clear himself, said that he never understood them; but one of complainant's witnesses, Director Reisch, honestly testified that the Vice-

President did understand them; that the Vice-President, in the bank, when Reisch was discharging his duties as director, told him, just after the Britt and Reeder corruption, just how the corruption was effected. Reisch on direct examination by complainant's attorney said:

> "No, sir; I just heard about it, about that Reeder note, about two days after, that Reeder went up that night in the bank and got $2,000.00 out, but that was about two or three days after that happened . . . Old man Reutlinger (Vice-President and Director) told me; he said the bank was open about six o'clock that night, and *Britt and Reeder and the whole gang there*, he gave a note and got $2,000.00 out of the bank. . . . No, sir, I just heard after that it was for the Council race, the Todd race, something like that. . . . I heard that three days after the money was out of the bank. . . . *Q.* What was it you heard in three days after the money was out of the bank? *A.* That the bank was open after six o'clock and they got $2,000.00 out of the bank. . . . Old man Reutlinger (Vice-President) told me that. . . . That the money was used for the Mayor's race, for the Todd race. . . . *Q.* Are you certain that Mr. Reutlinger told you that? *A.* He told me not in the directors' meeting; he told me that outside. . . *Q.* Were you not in the directors' meeting when that note was considered? *A.* Yes, sir, I believe that *that note did come up* and McKnight said, if Reeder did not pay it, he would."

Vice-President Reutlinger denied this, but Director Reisch is borne out by circumstantial evidence and by the inherent probabilities. At any rate, beyond all dispute, one director, Mr. Reisch, from whatever source he got his information, knew of this corruption, and he knew it before the matter came before the board; and the legal presumption is that he did his duty by telling the board what he knew. Notice to him was notice to them.

The payment of that $1,000.00 to Edmunds and the payment of the $2,000.00 to Britt and Reeder were held by the Circuit Court and by the Circuit Court of Appeals, according to the terms of the bond, to be "acts or defaults on the part of the employe (McKnight) which would give (and did give) the

employer (the bank) the right to claim" under the bond; and the bond provided that if the bank should "condone any such act or default," or should thereafter continue McKnight in its service without written notice to the surety, the bond company should not be responsible for any subsequent default. All the defaults for which the surety was held liable were these defaults and defaults that occurred later; and yet the Edmunds default and the Britt and Reeder default were clearly known at the time by the officers and several directors, and, we think, by the board itself; and those defaults were condoned; and, at any rate, the notice which was provided for in the bond was never given to the surety.

In spite of the foregoing fair statement of the evidence as it appears in the bill of exceptions, the Circuit Court, in the charge to the jury, said:

> "That none of them (the officers and directors of the bank) had any knowledge that any act of his (McKnight's), in the management of the said bank, was fraudulent or dishonest, until after the closing of the bank . . . that none of the officers of said bank, including the directory, had any knowledge of the various checks set up in the petition as fraudulent, etc."

The checks set up in the petition as fraudulent were the Edmunds check, the Britt and Reeder note, and the other checks that followed them, one of them being on the same date as the Edmunds check, and also held up for seven weeks as cash in the drawer. Every fraudulent act of McKnight described above he was able to do and did do "in the performance of the duties of his office or position." Every thing he did he was able to do by reason of his power as President, and every one of those acts was done in the Bank itself. His orders to the Cashier and his dealings with Edmunds were in the Bank itself; and Cashier Reutlinger and his father, Vice-President and Director Reutlinger, learned of all these things in the bank, in due course of its business, and while they were respectively engaged in attending the business of the bank.

The Court also told the jury positively that Cashier Reutlinger and Vice-President and Director Reutlinger did not understand the fraudulent nature of the Edmunds check for $1,000.00 or the Britt and Reeder note for $2,000.00. The Court also told the jury, in substance, that if the Cashier or Vice-President or any individual directors knew of these frauds and concealed them from the surety, the surety would still be liable unless "THE BANK," that is, the Board of Directors, as such, had knowledge of the frauds, practically had formal notice of them. The Court said:

> "The testimony in respect to the knowledge of THE BANK of the purpose for which the $2,000.00 was taken out at half past six or seven in the evening, I say the knowledge of THE BANK respecting that, must be proven, in my judgment, in such a way as to satisfy the jury that THE BANK, *as distinguished from any mere director of it, knew* of that transaction. . . . If you believe from the evidence that THE BANK did know of this fraudulent purpose and that this default of McKnight's, this fraudulent act of McKnight's, in getting this $2,000.00 was known to the Bank at the time, then I instruct you that all of the liability of the defendant in this case would cease then, that being the earliest or one of the earliest, if not the earliest, of all these transactions. If you believe from the evidence that this transaction was known and condoned by THE BANK at the time, before these other transactions occurred, then the defendant in this case is not liable. But, if you believe on the contrary that THE BANK did not know it, that it was the fraudulent act of McKnight alone, not participated in by *the Bank—when I say the Bank, I mean the Bank, I do not mean any individual director*—then the defendant is liable."

The jury must have understood this to mean that, even though they should differ from the Court and should believe that Director Reutlinger and Director Reisch, and even other directors, did know of McKnight's frauds, still their knowledge was not the Bank's knowledge, and that only a formal action of the Board of Directors of the Bank or a formal notice to the Board of Directors could be said to prove the knowledge of the Bank. If that be sound law, it will practically be impossible

ever to bring guilty knowledge home to "the Bank" itself or to the Board of Directors as a Board; and yet the Circuit Court of Appeals, giving a similar quotation from the charge, says: "We think this instruction as favorable as the Company was entitled to." If this be a fair statement of the law, directors of a corporation who wanted to indulge in questionable or corrupt practices with impunity could and would always find it easy and expedient to keep their information and records in such shape that nobody could bring out proof of guilty knowledge on the part of the corporation or Board of Directors.

This very case illustrates the impossibility of proving corrupt actions in the way required by the Court. Here not a witness could defendant find or introduce to prove these bald, unmistakably corrupt transactions. All proof of them had to be extorted by cross-examination from unwilling witnesses whose interest and wish it was undoubtedly to shield themselves from blame by saying that they did not understand what any boy of sixteen or any man of the dullest mind could have understood if he did not have a motive for refusing to understand. Let it be noted that all the incriminating circumstantial evidence against Vice-President Reutlinger, Cashier Reutlinger, and Director Reisch was admitted by them. Director Reisch admitted that he was told and, at any rate, thoroughly understood the corruption in the Britt and Reeder loan. Vice-President Reutlinger admits every thing, except that he denies that he saw or knew of the actual purchase of the four councilmen and the contents of their pledge or the contents of the corrupt pledge by the seven aldermen, including Britt and Reeder. He admits he knew every thing else about those two transactions. So does the Cashier. Let us concede, for the sake of argument, that we had never been so lucky as to prove by cross-examination of complainant's own witnesses the actual payment of the Edmunds' $1,000 to the four councilmen and the contents of the written pledge, and the contents of the corrupt Britt and Reeder loan; let us concede that, and still there would be enough evidence to show knowledge of

McKnight's guilt by Vice-President Reutlinger, Cashier Reutlinger, and Director Reisch. Vice-President and Director Reutlinger tells enough to show this, for he admits that he overheard McKnight's directions to the Cashier about the ten one-hundred-dollar bills, etc., and he admits that his son told him of the Britt and Reeder loan the same night, and that next morning he called McKnight to account when the latter had in his hand the yellow envelope, and which he then showed Vice-President Reutlinger, saying (as appears in the Bill of Exceptions, R. 40) that "*those fellows* had signed it, and that he would not sign that for the city of Louisville;" that "he had a document there in his pocket which was signed by those fellows," "the gang," as Reisch called them; that "he had a meeting up stairs (as the Cashier knew the evening before), and that paper was signed, and he would not sign it for the city of Louisville." "This conversation was had with him by the Vice-President when the Britt and Reeder matter was being discussed."

Even if Vice-President Reutlinger and Cashier Reutlinger and Director Reisch did not know the contents of those two corrupt pledges, or did not see the money paid, they at any rate knew enough to put them on inquiry—to make it their duty to investigate fully. When Vice-President Reutlinger, as he admits, began the investigation into the corrupt loan to Britt and Reeder, and reported it to the Board of Directors, it was his duty and the duty of the board to sift the matter to the bottom. The slightest investigation would have brought this corrupt matter to light. Political matters of that character, widely discussed in the newspapers, can not be concealed, and the officers and directors of the bank had enough information to enable them to probe the matter to the bottom. Edmunds, the political boss, and the aldermen and councilmen involved, could be easily investigated. The language of the Circuit Court of Appeals, fairly interpreted, practically lays down the doctrine that a bank or any other corporation can escape the duty of investigation and of exercising "due and customary supervision," and can escape the penalty of

fraudulent action by merely pretending to be satisfied with a trivial investigation and flimsy pretenses, such as McKnight offered, and by not passing any resolution as a board, or by not allowing any record or communication to be made of matters well known to the directors and officers individually. When we said that the directors in this case knew the fraud in the Edmunds transaction, and in the Britt and Reeder transaction, we were answered with the statement that those were questions of fact which were found against us by the jury, but the jury were compelled to ignore the proof as to those facts, because they were told in the charge that the knowledge of the individual directors or of the officers made no difference—that such knowledge was not the knowledge of the Bank, and that we could escape only by proving notice to the Bank itself or its Board of Directors, apparently in formal session. The verdict of the jury can not be construed to mean that the jury believed that the officers and individual directors were ignorant of the fraudulent nature of the Edmunds check and the Britt and Reeder loan, because the jury were told, as a matter of law, that the knowledge of the Cashier and the Vice-President, or of the individual directors, was not the knowledge of the Bank, and could not exonerate the surety.

As Director Reisch admitted that he knew, two or three days after the Britt and Reeder loan, of the corrupt nature of that loan, the jury would have been compelled to find for the surety, if they had not been told that any knowledge of Reisch alone of that corrupt deal was not the knowledge of the Bank, and would not justify a verdict for the surety. Not a syllable of evidence was there to contradict the admission of Director Reisch that he knew of this matter, even though there might be a dispute as to who gave him the information—whether it was Vice-President Reutlinger or somebody else.

The Circuit Court of Appeals, in its opinion, says:

> "We must remember that this obligation was intended to secure the bank against the fraudulent conduct of McKnight in the performance of the duties of his office or position;

that McKnight's action, in order to require notice to the company, must have been 'of the discovery of any default or loss under the bond.' While McKnight MIGHT *have been guilty of reprehensible conduct*, it would not require notice unless such as might result in the loss of securities, or money, or personal property of the bank by fraudulent conduct in the performance of his duties to the bank."

This is very mild language for a court of justice to apply to McKnight's purchase of four councilmen and two aldermen, and his causing his private debts to be paid on his own check when he was overdrawn in a large amount, and when he caused his checks to be held up as cash for seven weeks, and then had them charged to an improper account; but, waiving that mild censure of such conduct, it must be said that every act of McKnight's of which we complained was an act for which we were compelled to pay under our bond, because of his "fraudulent conduct in the performance of his duties to the Bank." Of all those acts so well understood we were entitled to notice at the time under the terms of our bond.

The Court says further:

"Misconduct which would not amount to a fraudulent act affecting the duties of the officer of the bank, would not require notice unless it came within that clause of the bond which requires the employer to notify the company when the employe engages in gambling or speculation, or indulges in disreputable or unlawful habits or pursuits. Whether McKnight's conduct was of this character, the court left the jury to determine. They must have found that there was no such misconduct as would avoid the bond while the bank was in operation, and which it was the duty of the bank to report to the company."

In the first place, all of McKnight's misconduct consisted in "fraudulent acts which affected his duties as an officer of the bank." In the next place, it could not be said that the jury "must have found that there was no such misconduct as would avoid the bond while the bank was in operation, and which it was the duty of the bank to report to the Company," for the simple reason that the charge of the court below practically told

the jury that the fraudulent acts of McKnight were unknown to the officers of the Bank and to the Directors of the Bank, and that no matter how fraudulent his conduct might be, and no matter how well the Vice-President, the Cashier and Director Reisch might have known of his misconduct, we could not be exonerated unless "the Bank" itself, that is, the Board of Directors, had formal notice of his misconduct, or, in some unmistakable way, as a board, connived at his misdoings.

The Circuit Court of Appeals also say:

> "In this connection it is averred that the Court erred in saying that this knowledge must be the knowledge of the bank, intending thereby to exclude the knowledge of individual directors. In the charge above quoted, as to the knowledge of the bank directors, we have already said that we find no error. We have carefully examined the record and find no knowledge brought home to the directors individually or the cashier in his individual capacity which was not brought to the attention of the Board, which would amount to a default under this bond. Such knowledge, in order to be binding upon the bank, must have been acquired in the course of business of the bank by such officer or director."

In the first place, we have shown from the Bill of Exceptions that Mr. Reisch, a director, testified that Vice-President and Director Reutlinger in the Bank itself told him two or three days after the Britt and Reeder loan that $2,000.00 had been gotten from the bank by two of the "gang," whom McKnight had at the bank at 6:30 P. M., and that it was used "for the council race, the Todd race, something like that." This would certainly "amount to a default under this bond." And nobody has ever pretended that this information was brought in this straight and direct form to the attention of the Board itself; but as two directors had the information, the legal presumption is that they gave their information to the Board. If the admission of Director Reisch as to what he was told by Vice-President and Director Reutlinger is not sufficient to show that these two directors knew of the corrupt use for which the Britt and Reeder loan was made, then no such fraud could ever possibly be satisfactorily proven. The

resumé above of the circumstantial evidence and the Cashier's own admissions show that the jury could have found, and we believe would have found, if correctly instructed, that the Cashier did have knowledge in his individual capacity of these frauds. All the knowledge which Vice-President and Director Reutlinger and Director Reisch and Cashier Reutlinger had was "acquired in the course of business of the bank transacted by such officer and director" in the bank. They got, so far as the proof shows, no knowledge outside of the bank or when they were transacting any business except that of the bank itself. After reading the bill of exceptions, showing the direct testimony of Director Reisch and the admissions of Vice-President Reutlinger and Cashier Reutlinger, we are at a loss to understand how this could be said in the opinion of the Circuit Court of Appeals:

> "The testimony shows no such knowledge of McKnight's conduct acquired in the bank's business by individual directors or officers of the bank and unknown to the Board, as would entitle the Company to notice."

If we were entitled to notice at all of any of these fraudulent and disgraceful proceedings connected with the Edmunds check for the purchase of four councilmen and the Britt and Reeder loan for the purchase of two aldermen, then undoubtedly the knowledge of these transactions had by Cashier Reutlinger and Vice-President and Director Reutlinger and Director Reisch was undoubtedly acquired in the Bank's business, and, according to complainant's testimony, that knowledge was never directly communicated to the Board as a board. Surely the highest court in our land ought to avail itself of a chance to say whether such reprehensible and disgraceful conduct on the part of the President of a bank, as occurred in this bank, can go on unchecked and unreported by the officers and directors of a bank, and yet there be no duty on the part of the bank to the surety who guaranteed the faithful conduct of the President, and who would be entitled to notice of any conduct of his in connection with the

bank that would be likely to inflict a heavy loss upon his surety. We have shown that Director Reisch by performing his duty as director in looking into the affairs of the bank, in the bank building itself, learned, whether from the Vice-President or not is immaterial, of the corrupt political deal between McKnight and Britt and Reeder, whereby the bank's $2,000.00 was lent without interest for a year to two insolvent city politicians; and yet the Circuit Court of Appeals in its opinion quotes with approval this language from Boone on the Law of Banking, Section 132:

> "A notice to one or more of the directors when engaged in the business of the Bank will be deemed notice to the Bank."

If that be sound law, why did the Bank or the Board of Directors not have notice (quoting the identical language of Reisch from the Bill of Exceptions) that "the bank was open about six o'clock that night and Britt and Reeder and *the whole gang* there; he gave a note and got $2,000.00 out of the bank;" that "it was for the Council race, the Todd race, something like that;" "that the money was used for the Mayor's race, for the Todd race."

Can it be that the surety under this bond was not entitled to notice of such outrageous corruption as that, when the Bank knew it, because Director Reisch knew it, to say nothing of Vice-President Reutlinger and the Cashier? Here (to use the language of this Court in American Surety Company v. Pauley, 170 U. S. 147) was "not simply a suspicion of the existence of such facts as would justify a careful and prudent man in charging another with fraud or dishonesty;" on the contrary, here was knowledge of such political corruption with the funds of the Bank as would justify any careful and prudent man, any honest man, in charging the President with fraud and dishonesty. If the Bank could allow its President to go on in such conduct without notice to a surety, who could afford to be a surety on his bond? There can be no dispute of the fact that Vice-President Reutlinger, as well as Reisch, knew that the Bank, at

McKnight's request, was kept open until 6:30 P. M. to lend $2,000.00 of the Bank's money, without interest for a year, to two members of the Board of Aldermen, before whom McKnight had been a candidate for Mayor a few days before, and that those men had no property and gave no surety. This much, at least, was discovered by Vice-President Reutlinger and reported to the Board of Directors in formal session. When the Board went that far under these suspicious circumstances, it was the duty of the Board to probe the matter to the bottom. As this Court said in Martin v. Webb, 110 U. S. 7, 15, in speaking of the diligence which Directors must exercise:

> "That which they ought, by proper diligence, to have known as to the general course of business in the bank, they may be presumed to have known in any contest between the corporation and those who are justified by the circumstances in dealing with its officers upon the basis of that course of business."

In Clerk's Savings Bank v. Thaw, etc., 2 Mo. App. 367, one director was told for whose benefit a certain note in controversy was discounted, and this director (like Director Reisch) was present in the Board as a director when the note was offered for discount and received by the Bank. The Court said:

> "We think this evidence quite competent, as tending to show notice to the bank that the paper was made for the accommodation of Morse & Co., and not of the Sectional Dock Company, and putting them on inquiry as to Drew's power and authority to make or endorse paper in the name of the Dock for any such purpose."

In the case of the National Bank of Asheville v. Fidelity and Casualty Company, 89 Fed. Rep. 819 (1898), it was held that the knowledge of the President of the dishonesty and flight of the Cashier, before the bond was renewed, bound the Bank and made the bond voidable. The Court held:

> "While under a bond insuring the fidelity of an employe, which requires the employer to make disclosure of any dishonesty of the employe known to him, the employer is not

bound to use diligence to discover such dishonesty, yet where in the exercise of ordinary and reasonable care and prudence in giving attention to facts known to him, he could not have failed to draw the inference that the employe was a defaulter, he may properly be charged with knowledge of such fact."

To the same effect is Thompson on Corporations, Sec. 5224. Union Bank v. Campbell, 4 Humphrey, 394. Bank of Pittsburg v. Whitehead, 10 Watts, 397; 36 Am. Dec. 186. Smith v. South Royalton Bank, 32 Ver. 341; 76 Am. Dec. 179. City Bank of Columbus v. Philips, 22 Mo. 85; 64 Am. Dec 254.

We have here a case like that of Graves v. The Lebanon National Bank, 10 Bush (Ky.), 23, in which Judge Lindsay said:

"There is no principle of law more settled than that persons proposing to become sureties to a corporation for the good conduct and fidelity of an officer to whose custody its money and other valuables are to be intrusted, have a right to be treated with perfect good faith. . . . We have, therefore, a case in which the directory of the Bank held out to others as a trustworthy officer a man who had been guilty of repeated embezzlements and frauds, all of which might have been discovered by the exercise of slight diligence."

In Morse on Banks and Banking, Sec. 134, it is said:

"The general rule actually adopted is as follows: If the director acquired it (knowledge) in his official capacity, or in the course of or in relation to any special matter or function of which he had charge as an agent of the Bank, then he knows it as a director, and the law holds that the Bank also knows it. . . . Whatever knowledge a director acquires within the scope of his official employment he is bound to communicate to his co-directors, that is to say, to the Bank itself. If he neglects to do so, the Bank is liable for the neglect of its agent to perform the duty of his agency. By either road the same conclusion is arrived at, which is the liability of the Bank to the same extent as if it had known what its director knew and ought to have communicated."

Not only in this case have we the direct and unqualified admission of Director Reisch that he knew how corruptly the

$2,000.00 had been lent to Britt and Reeder for a year without interest, but we have also strong circumstantial evidence to show that the Vice-President and other directors and the Cashier knew of McKnight's defaults.

In Tolbridge v. Betsworth, 30 Conn. 380, it was held that, as a general rule, what the directors of a corporation know regarding matters affecting the interests of the corporation the corporation will be held to know, and *knowledge on the part of the directors may be inferred from circumstances*, and it is not always necessary to show it by direct proof.

In the case of the Conn. Mutual Life Insurance Company v. Scott, 81 Ky. 540, the Court exonerated a surety because the Insurance Company had not notified the surety of its agent that the agent had been in default and had taken his son into partnership with him. The Court said:

> "A brief recitation of them (the facts shown by circumstantial evidence) will be sufficient argument to show that the appellant knew, or ought to have known, of the existence of the partnership, and actually acquiesced in its conduct of the business of the agency. . . . And it will not be allowed to draw a distinction between the knowledge of its president and other officers who transact the daily business of the company, and knowledge received by its board of directors in official session, for the purpose of escaping the effect of such a knowledge. There are two good reasons for disallowing such a distinction in a case like this—first, because information coming to the officers elected by the board, and entrusted with the daily transaction of the business of the company and those who deal with it, and which is necessary or naturally connected with its performance, and which such officers are in duty bound to disclose to the board, must be treated as the information of the board and binding upon it; second, because if this were not so, all advantages would be given the company in admitting or denying the information, which might never find its way to the board in official session or in its technically official capacity, although its president and other officials might possess the information and be the only channel through which it could ordinarily be communicated to the board."

In the McKnight bond sued on, the Bank specifically agreed:

(1) That it would observe "due and customary supervision over

the employe (McKnight) for the prevention of default," and (2) that "if the employer should at any time during the currency of his bond condone any act or default on the part of the employe which would give the employer the right to claim thereunder, and should continue the employe in its service, without written notification to the Company, the Company shall not be responsible, etc." The Court, in its instructions, gave the jury no aid in deciding what "due and customary supervision" was, and when the jury, being unable to agree, on the second day, asked if they should find for the defendant "if they agreed that the directors of the Bank were careless in the management of the Bank," they were told in strong terms that carelessness of the directors in the management of the Bank could not be considered by them; and yet carelessness is but a want of "due and customary supervision."

It is evident that the jury did not believe that the directors had exercised "due and customary supervision" over McKnight; it is evident that the jury believed that the directors had been careless; that they either knew of his defaults or could have known of them by slight care, and, therefore, the jury evidently wished to find for the defendant, if they could do so on that ground. The directors, under their oath, provided by the National Banking Act, were compelled "diligently and honestly to administer the affairs of such an association."

In Marshall v. Farmers M. S. Bank of Am., 85 Va. 676; 17 Am. St. Rep. 84, the directors of a bank, for their negligence and carelessness, were held personally liable to the creditors of the bank, the Court saying:

> "Ignorance on the part of the directors of a bank of any fact which it is their duty to know can never be set up by them in defense or exculpation for any act which the existence of that fact should have prohibited."

In People v. Jansen, 7 Johns. 331, the sureties on a bond were released because of the neglect or carelessness of the officers

of the State in exercising proper supervision over the officer in default, the Court saying:

> "The security had a right to look to the provisions of the statute and calculate his liability on the presumption that the duties enjoined upon these public officers would be faithfully and punctually discharged, and if so, he could in no event be liable for more than one year's deficiency."

See Harbor Comm'rs v. The Guaranty Company of N. America, 22 Canada Sup. Court, 542 (see note 19 C. C. A. 276); Philips v. Foxall, L. R. 7 Q. B. 666.

In United Society of Shakers v. Underwood, 9 Bush (Ky.), 609, 621, the Court held that the directors of a bank were personally liable for their carelessness, and that

> "Whatever information might be acquired by ordinary attention to their duties, they may, in controversies with persons transacting business with the bank, be presumed to have. . . . It is not necessary in many cases to show directly that the directors had their attention called to the mismanagement of the affairs of the bank, or the misconduct of the subordinate officers. It is sufficient to show that the evidences of mismanagement or misconduct were such that it must have been brought to their knowledge unless they were grossly negligent or willfully careless in the discharge of their duties."

In the case of Briggs v. Spalding, 141 U. S. 132, the Supreme Court said, as to the care which a Board of Directors ought to exercise to prevent default, the following:

> "If nothing has come to their knowledge to awaken suspicion of the fidelity of the president and cashier, ordinary attention to the affairs of the institution is sufficient. If they become acquainted with any fact calculated to put prudent men on their guard, a degree of care commensurate with the evil to be avoided is required, and a want of that care certainly makes them responsible."

It is clear that Director Reisch and Vice-President and Director Reutlinger, after the Britt and Reeder "gang" had gotten $2,000.00 out of the Bank on a corrupt loan for a year without interest and without security, though they had no prop-

erty, ought to have used care to discover the true situation of affairs, and they would thus have easily detected McKnight's political corruption with the means of the Bank. The publicity which hostile newspapers give to such political deals makes their detection easy. McKnight's scheme to block the efforts of the Mayor of the city by corrupt control of seven aldermen, a few days after the election, could not long be concealed from the Mayor's supporters in the Council and in the press.

SECOND POINT.

The knowledge of Vice-President Reutlinger and Cashier Reutlinger of McKnight's defaults bound the Bank, but we understand the decision of the lower court to greatly restrict, if it does not nullify, the rule that the knowledge of such officers acquired in due course of business is the knowledge of the Bank.

In this case the Vice-President, who was also a director, was not a mere figurehead. He was paid a salary of $1,500.00 per year (R. 44) for constant attendance in the Bank with active duties to perform. His desk was in the Bank (R. 50), where he could see and hear all important transactions. "He frequently examined the books of the Bank and kept the run of the Bank and what notes were discounted by the Bank and what overdrafts existed." "He sometimes acted as Cashier and Teller for his son." He was "familiar with the management of the German National Bank during all the time Mr. McKnight was there." He was (R. 47) "custodian of the Bank's cash reserve of many thousands of dollars." "It was the custom of the Cashier (R. 47) to tell his father, the Vice-President, all that went on at the Bank, etc." There was no collusion between the Vice-President or Cashier and McKnight because "the feeling between Adolph Reutlinger, the Vice-President, and McKnight (R. 47) was not friendly during the year 1896." On March 11, 1895, he wrote a letter to the Fidelity & Deposit Company about McKnight's bond (R. 40), but this letter was excluded by the

Court from the jury. Evidently this was an active officer of the Bank.

The circumstantial evidence already set out shows that the Vice-President knew all about the Edmunds check for $1,000.00 and the Britt and Reeder loan except as to the contents of the two corrupt pledges and the names signed to them. He certainly knew there was crookedness and fraud, if not political corruption, in these deals; and that was enough for him to know. As the Bill of Exceptions shows (R. 46), he often had conversations with Edmunds, the political boss, during the heat of the canvass, at the Bank, which was evidently the political headquarters, and "*knew the purposes of his visits.*" As to the Britt and Reeder loan, he knew all that any man of sense needed to know to understand that a fraudulent political deal was being carried out with $2,000.00 of the Bank's money. The knowledge of an active Vice-President, who was a director, when the President was perpetrating frauds and when there was no collusion, ought to be considered the knowledge of the Bank when outsiders are concerned; and all the authorities cited and the reasoning applied in the American Surety Company v. Pauly are consonant with that principle.

The proof of the Cashier's guilty knowledge is equally complete; but we understand, and we believe the jury understood, the Court's instructions to say in substance:

> (1) That the Cashier did not have knowledge of any fraud or default;
>
> (2) That if he did have such knowledge, he did not get it in due course of business (though all he learned was learned while he was at work on the Bank's business in the Bank itself);
>
> (3) That if he did have such knowledge, it made no difference in law, because his knowledge is not the Bank's knowledge.

The Circuit Court told the jury in substance that notice to the Cashier of McKnight's defaults was not notice to the Bank, and yet when we, in complaining of this erroneous charge, say

that the Cashier did have such notice, and that the jury, if correctly instructed, would have so found, we are answered by the Circuit Court of Appeals with the statement that the jury found by their verdict that there was no notice. In the Court's Fifth Instruction (R. 73–4), which referred to the knowledge of the officers and directors of McKnight's defaults, the Court by repeatedly saying "if the Bank had known" and "if the Bank did not know, etc.," must evidently have led the jury to believe that no knowledge of the officers or directors of the Bank was of any consequence; that "the Bank" itself must know, that is, the Board itself must know, and this is made clear by the Sixth Instruction, which says (R. 74):

> "I do not think that the knowledge of a cashier of a bank, speaking generally, is the knowledge of the bank as to any matter that does not come within the customary or ordinary duties of a cashier or those which have been specially imposed upon him by the action of the bank. I do not think Mr. R. E. Reutlinger in this case, in respect to any matter which he knew or could do, represented the bank, if it was outside of his ordinary duties; and I do not recall any thing that he knew, so far as the proof shows, that would in anywise affect the liability of the defendant in this case."

The National Banking Act (Section 5136, Sub-section 7) authorizes a National Bank to exercise its powers "by its board of directors, or duly authorized officers or agents." As said in Boone on the Law of Banking, Section 103, "the cashier of an incorporated bank is the general executive officer to manage its affairs in all things not peculiarly committed to the directors, and he is *the agent of the corporation, and not of the directors.* As such executive officer he transacts most of the business of the bank. He is held out to the world by the bank as its general agent for the transaction of its affairs, within the scope of the general usage, practice and course of business of banking institutions; and his acts within such scope of authority will in general bind the bank in favor of third persons possessing no other knowledge. *The directors may limit his authority as they deem*

proper, but this would not affect those to whom the limitation was unknown."

For many purposes the Cashier, as much as the Board of Directors, is the agent of the Bank.

In Thompson's Com. on the Law of Corporations, Section 4740, it is said:

> "A cashier of an incorporated bank is regarded in law as its general executive officer. He is in no sense the agent of the Board of Directors. He is a statutory officer, not of the directory but of the corporation. . . . Though chosen by the directors, he is as much the statutory agent of the corporation as the directors themselves."

In Mechem on Agency, Section 718 (Ed. 1889), it is said that a notice to, or the knowledge of an agent like a cashier, is the knowledge of the corporation, except (1) when it is the duty of the agent (like a lawyer or a priest) not to disclose what he knows, or (2) when the agent is really acting in his own interest or in another's interest, and adversely to the principal, and where there is collusion, and (3) when the person claiming the benefit of the notice was in collusion with the agent to cheat or defraud his principal. None of those exceptions apply in this case.

See Story on Agency, Section 140 (*b*), Thompson on Corporations, Section 5224, and Morse on Banks and Banking, Sections 152-3, 166.

In the Distilled Spirits, 11 Wallace, 356, the Supreme Court held that the knowledge of an agent who bought the distilled spirits that they had been removed from the warehouse by fraud, was the knowledge of his principal.

In Biswell v. First National Bank of Franklin, 69 Pa. St. 415, it was held that the cashier is the agent of the corporation, not of the directors; that what he knows the bank knows, even though he should not communicate the knowledge to the board of directors. That case is exactly in line with the opinion of Judge Story in Minor v. The Mechanics Bank of Alexandria, 1 Peter, 46, in which case it was held that the cashier, in some

respects, is as much the representative of the bank as the Board of Directors, and that he can not excuse himself for improper practices even by showing an order from the board; that he is not merely the helpless creature of the board, but is the agent of the bank itself; that he can not blindly do improper things on the order of the board, much less on the order of the President.

In the Birhamham Trust and Savings Company v. The Louisiana Bank, 99 Ala. 379 (1893), it was held that the cashier's knowledge of a pledge was the knowledge of the bank, the Court saying:

> "Otherwise knowledge or notice could never be traced to the corporation, and the utmost insecurity in dealing with it would follow. And upon general principles of public policy it is and must be presumed that the agent communicates to the principal the facts of which he acquires knowledge or notice. If the communication is not made, it is the fault or neglect of the agent, which must be visited on the principal, rather than upon strangers dealing with the agent, within the scope of the agency."

To the same effect are Potter v. The Bank of Rutland, 19 Ver. 410; Central National Bank v. Levin, 6 Mo. App. 543; Holden v. The New York & Erie Bank, 72 N. Y. 286 (1878); Duncan v. Jaudon, 15 Wallace, 165.

In Veasy v. Graham, 17 Ga. 99, the President and Cashier of a Bank made a deed to the President of the Bank's property, and this deed was set aside, the Court saying:

> "The Cashier had actual notice of the fact, because he aided in executing his title. To whom else should notice have been given? The stockholders or the directors or both? We know of no such practice."

In A. C. Freeman's exhaustive notes to the case of the Bank of Pittsburg v. Whitehead, 36 Am. Dec. 186 (10 Watts, 396), it is said that "a corporation must be held to know what its President and general officers know;" that what is known to the President and Cashier is known to the Bank; that "the Cashier of a Bank is its general agent, managing all its concerns, except

such as are committed directly to the Bank Directors." To the same effect are the cases of New Hope Delaware Bridge v. Phoenix Bank, 3 New York, 156; McGurk v. Metropolitan Life Insurance Company, 1 Law Rep. Ann. 563, or 56 Conn. 528; Bank of America v. McNeal, 10 Bush (Ky.), 54; Cook on Corporations, Sec. 727; Thomson-Huston E. Co. v. The Capitol Electric Company, 65 Fed. Rep. 341; Wilson v. Pauly, 77 Fed. Rep. 129.

In Mechanics' Bank v. Gilmartin, 93 Ga. 504, it was held, on circumstantial evidence, as in our case, that the President of the Bank, who knew that the Cashier was speculating and saw him in consultation occasionally with brokers and learned casually from them that he was dabbling in stocks, must be presumed to have sufficient knowledge to put him on inquiry, and his knowledge was imputed to the Bank, and the Bank was held liable for the bonds fraudulently converted by the Cashier.

The rule we are contending for is not at all modified or impaired by the decision in the case of the American Surety Company v. Pauly, 170 U. S. 559, in which the Supreme Court recognized the soundness and the binding force of the foregoing authorities, and admitted that the general rule was the one for which we are contending. In that case the Supreme Court quotes with approval the charge of the lower court to this effect:

> "Ordinarily a corporation, like any other principal, is chargeable with the knowledge of any facts which are known to its agent, but in this case all the transactions, if there were any transactions of a fraudulent and dishonest character on the part of the Cashier, were transactions for the benefit of Collins, and he was a participator in the fraud, and under these circumstances the law does not infer that the agent or the officer will communicate the fact to his principal, the corporation."

Justice Harlan, in rendering the opinion of the Supreme Court, held that, as President Collins and Cashier O'Brien were in collusion to defraud the Bank, the knowledge of neither one could be imputed to the Bank, because it could not be presumed

that they would tell the Board of Directors that both of them were defrauding the Bank. The Supreme Court said:

> "The presumption that the agent informed his principal of that which his duty and the interests of his principal required him to communicate does not arise where the agent acts or makes declarations not in execution of any duty that he owes to the principal, nor within any authority possessed by him, but to subserve simply his own personal ends, or to commit some fraud against the principal. In such cases the principal is not bound by the acts or declarations of the agent unless it be proved that he had at the time actual notice of them, or, having received notice of them, failed to disavow what was assumed to be said and done in his behalf."

The Supreme Court then quotes a large number of authorities, all holding in substance that when the agent is himself trying to defraud his principal it will not be presumed that he communicates to his principal the knowledge he has, or that he tells the principal just how he is trying to defraud the principal; and then the Supreme Court continues:

> "Further citation of authorities would seem to be unnecessary to support the proposition that, if Collins gave the certificate that he might, with the aid of O'Brien as cashier, carry out his purpose to defraud the Bank for his personal benefit, the law will not presume that he communicated to the Bank what he had done in order to promote the scheme devised by him in hostility to its interests. In our judgment the Circuit Court of Appeals correctly held that plaintiff's right of action on the bond was not lost because its President, Collins, made to the defendants false representations as to the cashier's honesty; and that, when two officers of a corporation have entered into a scheme to purloin its money for the benefit of one of them, in pursuance of which scheme it becomes necessary to make false representations to a third person, ostensibly for the Bank, but in reality to consummate such scheme, and for the benefit of the conspirators, and not in the line of the ordinary authority, the corporation being ignorant of the fraud, the officers are not, in thus consummating such theft, the agents of the corporation."

This was the principle on which the Court rested its opinion, and in so doing it laid down the law exactly as it is stated in

Mechem on Agency, Sec. 718, a section which we have heretofore quoted. Mechem says there are only three exceptions to the rule that the knowledge of the agent will be imputed to the principal, and those three exceptions are the following:

> "(1) Where it is such as it is the agent's duty not to disclose (as where he gets confidential knowledge as an attorney, priest, etc.), and,
>
> "(2) Where the agent's relation to the subject-matter or his previous conduct render it certain that he will not disclose it (as where he is trying to carry out or aid another in carrying out a fraudulent scheme, such as Collins and O'Brien were carrying out), and,
>
> "(3) Where the person claiming the benefit of the notice, or those whom he represents, colluded with the agent to cheat or defraud the principal."

In the McKnight case the Cashier was not acting in collusion with the President. There is no pretense that the Cashier was purposely trying to assist McKnight in defrauding the Bank. The proof showed that the feeling between McKnight and the Vice-President was unfriendly, and that the Cashier, on the night of the Britt and Reeder transaction, went as late as nine o'clock in the evening to the Vice-President's house to notify the Vice-President, who was a director, that McKnight, whom he disliked, had carried out that corrupt deal with Britt and Reeder. Hence it appears that the case of the American Surety Company v. Pauly is a direct authority in favor of the petitioner, and is in line with the text-books and cases cited and relied on in this brief.

THIRD POINT.

A Cashier's reply in due course of mail to a letter of inquiry addressed by a surety to the Bank itself is admissible as evidence against the Bank without preliminary proof by the surety that the Board of Directors gave formal or special authority to the Cashier to write that particular letter; but the contrary principle has been established in this case by a majority of the court below in misapprehension of the meaning of the Pauly case.

The surety, on May 15, 1896, wrote a letter to the German National Bank, and asked the Bank to certify whether or not McKnight's books and accounts were correct, and whether all moneys handled by him had been accounted for. The Cashier, in due course of mail, returned the certificate on May 29, 1896, and said: "He has performed his duties in an acceptable and satisfactory manner, and we know of no reason why the guarantee bond should not be continued."

The court below refused to allow that letter or certificate of the Cashier to be read to the jury, because the surety was not able to prove that there had been a formal vote by the Board of Directors authorizing him to write such a letter. It can not be disputed that a surety is entitled to an honest and candid answer from the employer when inquiry is made; and, when the answer is returned in due course, and by one apparently authorized to answer, the surety should be able to rely upon the answer; but the court below held that the answer of a cashier to a surety, in due course, can not be proven unless proof is made that by formal action of the board itself he was authorized to write that particular letter. Such proof would generally be impossible. This decision was based upon the language used in the American Surety Company v. Pauly, and yet we respectfully submit that the decision in that case will not bear such a construction.

In the first place, we sought to show by the Cashier himself that this bond was not obtained by McKnight for his own benefit, but that the Bank itself (R. 54) selected the surety of the

President and Cashier and paid for the bonds, and that "all these bond matters were discussed by the Board of Directors," but the lower court would not allow us to prove these facts. In the second place, because the Supreme Court in the Pauly case said that a president could not, in a mere letter of recommendation for the cashier when he was first applying for a bond, bind the bank by his statement, the Circuit Court in this case has held that a cashier could not answer an inquiry by a surety in due course of business and state as a fact how the President had performed his duties unless the cashier had been first authorized to answer by a formal resolution of the Board of Directors.

A contract made by a bank with a surety is like any other contract made by a bank, and a letter written by a cashier on that business is like any other letter written by him on the business of the bank. If the Courts attempt to draw distinctions between the various contracts made by a bank and between the multitudinous letters which a cashier must write in the ordinary course of business, and to say that, as to certain contracts, he can speak for the bank in its correspondence without formal proof of his authority, but, as to other contracts, he can not write without a formal resolution of the board, and that when he has written a letter it can not be proven till formal proof is made of his authority to write that particular letter, the Court will get into endless difficulties, and the public will never be able to rely upon the letters or assurances of the only officer who is, by usage and by law, authorized generally to act and to write for the bank. The decision in this case is not a logical corollary of the Pauly case, and is in conflict with the text-books and decisions which have long settled the law as to the inherent powers of a cashier. Not only will this decision unsettle the law, but it will make the transaction of business with a bank troublesome and unsafe. One of the judges of the Circuit Court of Appeals did not approve this departure from a well-settled rule.

There is a wide difference between the duties and powers of a President and a Cashier. The Cashier is the chief executive

officer of the bank. To him is entrusted the duty of conducting the correspondence of the bank. Persons who receive letters from him about the contracts of the bank can not require, as proof of his authority, a certificate of the board that he has been authorized to act. That would stop the business of a bank. If he said in his letter that he had been authorized to act, outsiders would still not know whether his statement was true. To write at all is a tacit assurance that he has been authorized to write. When inquiries are addressed to the bank (as in our case), his answer must be presumed to be authorized, at least until the contrary is shown. To require proof of his authority in each case, or in ordinary cases, would be unreasonable and clog business, and would prepare endless traps for honest but unwary men. If the law were so unreasonable, a bank could often get an advantage of others by simply taking no formal action that could be proved, and by giving to the Cashier no special authority that could be established by evidence in court. While he was entrapping unsuspecting parties dealing with him in good faith on the assumption that he was authorized to do what he held himself out as able to do, the Board could sit still complacently and having eyes see not, and having ears hear not; but in the end could keep the benefit while repudiating the corrupt means by which it was attained.

In this very case the Bank, as well as McKnight, wanted his bond renewed. It could not get the bond renewed without a statement by its cashier to the effect that McKnight's accounts and moneys were correct, and that he had performed his duties in an acceptable and satisfactory manner, and that no reason was known why the guarantee bond should not be continued. The letter was addressed to the Bank; the Cashier responded and made the statement necessary to enable the Bank to get what it wanted. It got the benefit of the Cashier's letter, and is now contending that he had no authority to write the letter. The Bank was paying for the bond. That is the custom now with the banks. It is admitted that we were deceived by the letter of the Cashier;

that but for that fraud we would not have executed the bond. In conscience and in law the Bank can not hold the advantage while repudiating the false statement made by the only officer that could conduct its correspondence.

The renewal of this bond was the business of the Bank; as much so as any other business it had. This answer of the cashier to our inquiry was made in the regular course of business, and came strictly "within the customary or ordinary duties of a cashier." He was not acting "outside of his ordinary duties." On the contrary, he was acting "within the scope of his agency." We have shown that there was no collusion between the Cashier and the President, and that the Cashier informed his father, the Vice-President and director, of every thing that went on at the Bank, and that the father, during 1896, was not friendly to McKnight. As the Bank ratified the act of the Cashier in writing that letter for the purpose of continuing the bond from June 1, 1896, to June 1, 1897, and as we renewed the bond on the faith of his letter of May 29, 1896, and as we would not have renewed the bond but for that letter, the Bank can not hold the benefit of the renewal bond without ratifying and approving the act of the Cashier in writing the letter.

In Morse on Banks and Banking, Sec. 162, it is said that "the Cashier has charge of the correspondence of the bank," and that "letters on corporate business are properly addressed to him, and whatever statements or information are contained in them will, in law, affect the bank with notice." See Sec. 165 (*b*); Section 171 (*d*). In Section 98 (*c*) the same author says that "whether at common law or under such statutory enactments, they (the directors) seek to curtail the ordinary powers of any of their officers, their action in so doing can only be valid as between the officer and the bank."

In Boone on the Law of Banking, Sec. 115, it is said: "The cashier is also the agent of the bank for the purpose of writing and receiving letters on the subject of its ordinary business. A letter from him on the business of his bank is a letter from his bank, and a letter to him relating to the business of his bank

is a letter to his bank; and the bank is chargeable with knowledge of the contents of such letter."

In Thomas v. Wells, 140 Mass. 517, it was held that where a letter was written to a firm and it was answered on the letter-head of the firm by an agent who ordinarily did not conduct the correspondence of the firm, the letter was nevertheless admissible against the firm, the Court saying:

> "It was written upon the business paper of defendant's firm, and was in answer to a letter sent two days before by the plaintiffs to the defendants, to which plaintiff required an answer and to which no other answer was returned. Upon this evidence it was not a violent inference for the jury to draw that the plaintiff's letter had been handed for an answer to Wells, the salesman who had made the contract with the plaintiff and knew what its terms were."

See Morse v. Conn. River R. Co., 6 Gray, 450; McGenness v. Adriatic Mills, 116 Mass. 177.

In McGee v. The Manhattan Life Insurance Company, 92 U. S., page 93, the Supreme Court held that, though a surety might not be released where he did not ask for information, he would be released when he asked for information and was not given a true answer, the Court saying: "If the surety desires information, he must ask it. . . . If the creditor be applied to, he must make a full and frank communication." (See Brandt on Suretyship and Guar. (Ed. 1891), Secs. 421, 422, 423.)

In Merchants Bank v. The State Bank, 10 Wallace, 604, it was held:

> "Where a party deals with a corporation in good faith—the transaction is not *ultra vires*—and he is unaware of any defect of authority or other irregularity on the part of those acting for the corporation, and there is nothing to excite suspicion of such defect or irregularity, the corporation is bound by the contract, although such defect or irregularity in fact exists."

In Xenia Bank v. Stewart, 114 U. S. 224, the Court said:

> "The letter was written on the paper of the Bank and by the person shown to be its cashier, and it appears with reasonable certainty to have referred to the business of the Bank. The Court was, therefore, right in not excluding it from the jury."

See Case v. The Bank, 100 U. S. 446–454; Martin v. Webb, 110 U. S. 7; Badger v. Bank of Cumberland, 26 Maine, 428; *Coldwell v. National Mohawk Bank, 64 Barbour, 333; Birmingham Trust & S. Co. v. Louisville Bank, 20 Law Rep. Ann. 600.*

Morse on Banks and Banking, Section 103, says:

> "Where the officer of the Bank knows that his answer to the inquiry (for information) is to form the ground of future action on the part of the inquirer, so that accurate information is not merely desired to satisfy a curiosity as to an occurrence wholly in the past, but is sought and needed for governing important dealings in the present and future—there the Bank is bound."

In the Pauly case, Justice Harlan, in the opinion, cites the case of Bennett v. Judson, 21 N. Y. 238, as follows:

> "In Bennett v. Judson, which was the case of an agent of the vendor of land who made material misrepresentations as to its location and qualities, assuming to have knowledge of the facts, but without express authority from his principal, the Court said: 'There is no evidence that the defendant authorized or knew of the alleged fraud committed by his agent Davis in negotiating the exchange of land. Nevertheless, he can not enjoy the fruits of the bargain without adopting all of the instrumentalities employed by the agent in bringing it to a consummation. If an agent defraud the person with whom he is dealing, the principal, not having authorized or participated in the wrong, may, no doubt, rescind, when he discovers the fraud, on the terms of making complete restitution; but so long as he retains the benefit of the dealing he can not claim immunity on the ground that the fraud was committed by his agent and not by himself. This is elementary doctrine, and it disposes of one of the questions raised at the trial.'"

As the lower court in the McKnight case excluded this letter of Cashier Reutlinger to the surety, and as a majority of the Judges of the Circuit Court of Appeals approved this action solely because they thought they were constrained to do so by the ruling in the American Surety Company v. Pauly, it may be well to note the marked difference between that case and this.

In the suit on the O'Brien bond, it appeared that President Collins simply gave a certificate of good character to O'Brien when the latter was first applying for a bond. That was merely the answer of an individual to whom, as a friend of O'Brien, an inquiry had been addressed; that was no part of the business of the President of the Bank. It is not the business of a President to conduct the correspondence of the Bank, and the letter of inquiry was not addressed to the Bank. In the McKnight case the letter was addressed to the Bank itself, and it called, not for a letter of recommendation, but for a frank, fair statement as to certain facts known to the Bank or its Cashier. That letter of the surety could be answered only by the Cashier. McKnight himself could not answer it, and the Board of Directors could speak only through the Cashier; and, as we have shown, by law and by custom, the cashier is the proper one to answer all correspondence. In the O'Brien case it was a question merely of character; and the surety and the Bank had had no dealings together before. In the McKnight case there was no longer any mere question of character, but a question of fact, namely, whether McKnight had performed his duties during the past year in an honest and satisfactory manner. That was a matter that concerned the Bank itself, and about which there could be no doubt, and as to which the surety was entitled to a frank and correct answer. In the opinion in the Pauly case Justice Harlan lays stress upon the fact that President Collins' answers were merely commendations of a man who had not yet given a bond to the Bank with that surety, the Court saying: "No relations existed between the Bank and the Surety Company until O'Brien presented to the former the bond in suit."

The true meaning and effect of the Pauly case should now be made clear for the guidance of sureties and of other courts.

FOURTH POINT.

The words "immediate notice" are stronger than the words "with reasonable promptness" or "within a reasonable time;" and "immediate notice" implies prompt, vigorous action without any laches or needless delay; and where there is no dispute as to the facts, this question is one of law; and two or three weeks' delay in writing a short letter as a notice to the Surety after fraud has been discovered is not "immediate notice."

Under the bond the surety was entitled to immediate notice of McKnight's first default. That notice was not given, and the Circuit Court of Appeals has decided in this case that "immediate notice" is the same as "notice with reasonable promptness." We respectfully submit that that is not consonant with the authorities. The bond provides as follows: "That the German National Bank shall (*a*) immediately give the Company notice, in writing, of the discovery of any default or loss hereunder, and (*b*) shall file with the Company his or their claim hereunder, with full particulars thereof, as soon as practicable thereafter," etc.

Here two things are stipulated for, (1) an immediate notice, and (2) a claim "as soon as practicable thereafter." The Circuit Court of Appeals has practically decided that the word "immediate" is exactly the same in meaning as the words "as soon as practicable thereafter"; and yet the difference between these words is here brought into sharp contrast by the contract itself. The parties in interest evidently intended to make a clear distinction, which the Court has ignored.

It is manifest that Vice-President and Director Reutlinger, and Cashier Reutlinger and Director Reisch, knew of McKnight's defaults in January, 1896, and hence an "immediate notice" should have been sent to the surety at that time. If we conceded, however, merely for the sake of argument, that the

knowledge of these officers of the Bank was not the Bank's knowledge, still the surety was entitled to immediate notice from the Receiver in this case, and such immediate notice was not in fact given. If, as the Circuit Court of Appeals has held, a letter such as Receiver Courtney wrote to the surety on February 18, 1897, is sufficient in form and substance, there is no reason why such a letter could not have been written and sent through the mail within one day or two days of his discovery of the first default. The writing of such a letter was a matter of a few moments, and such an important business transaction, so easily attended to by him and so vital to us, should not have been delayed a day. The Circuit Court of Appeals admits that he delayed the writing of such a short note without any excuse whatever for at least two or three weeks. That was not good faith to the surety, and was not a compliance with the bond. It was highly important to the surety that it should know at once of its peril when the Bank Examiners and the Receiver first discovered a default, and when McKnight was put in prison for his frauds. The surety should have been allowed a chance at once to take steps to secure indemnity from McKnight or his friends or to attach his property. To keep the surety in the dark for even two or three weeks, while McKnight's property could easily have been put beyond reach of the surety, when the Receiver had only to spend five minutes in writing such a notice as he sent to the surety, was unreasonable and unpardonable. It was not immediate notice, and it was in clear defiance of the plain letter and evident spirit of the bond. The Receiver might with reasonable excuse have delayed two or three weeks to make out a formal claim and prepare proofs and get exact information for such a document, but he did not need a single day for the petty task of writing such a letter as he in fact wrote on February 18, 1897.

Bouvier's Law Dictionary, quoted by the Circuit Court of Appeals, says: "The words 'forthwith' and 'immediately' have the same meaning. They are stronger than the expression

'within a reasonable time,' and imply prompt, vigorous action without any delay, and whether there has been such action is a question of fact having regard to the circumstances of the particular case."

In other words, this authority does not agree with the opinion of the Circuit Court of Appeals and the Circuit Court that the word "immediately" means only "within a reasonable time." If, as the Circuit Court of Appeals admits, the Receiver and the experts "began to discover them (the defaults) two or three weeks after the bank was closed," or in other words, that "the discovery was first made between the second and ninth of February, 1897," and yet that the Receiver did not write his short note to the surety until February 18, 1897, that certainly was not "prompt, vigorous action without any delay." That was gross laches, and a great wrong to the surety. No excuse whatever has been offered for the long delay of so simple a matter.

The Circuit Court of Appeals said:

> "We have already said no notice is required until the Bank had knowledge of facts which would justify it in charging dishonesty. . . . Assuming that the defalcations were becoming apparent to the experts so that they began to discover them two or three weeks after the Bank was closed, we can not say as a question of law that such facts had been discovered as would justify a prudent man in charging another with dishonesty so as to require notice, etc."

It is conceded that the Bank because of an examination by the Bank Examiner, and the discovery of fraud, was closed on the 17th of January, 1897. "Mr. McKnight (Record 43) was arrested the following day after the closing of the Bank." In other words, McKnight was promptly charged with dishonesty. Evidently "such facts had been discovered as would justify a prudent man in charging him with dishonesty." The Receiver himself said (Rec. 42): "Almost immediately after the Bank passed into my hands as Receiver I began to ascertain the defalcations. . . . The experts were at work immediately after Mr.

McKnight's arrest. *I kept pace with their investigation.* It was almost immediately after the Bank closed that these defalcations became known, not all of them, but enough to ground the claim upon." The Examiner himself said: "We began to get these shortages about two or three weeks after the Bank was closed. They were discovered from time to time. I began to discover them in two weeks."

With the Bank closed by the Controller of the Currency for fraud after a previous examination by the Bank Examiner; with McKnight under arrest evidently for such fraud, and with the Receiver fully informed of the very first discovery of the frauds, which must have been discovered even before two weeks, but which were undoubtedly discovered in two weeks after the Bank closed, the Receiver, though bound to give us immediate notice, would not undertake the petty labor of writing eleven lines to us until two or three weeks had passed—until from fourteen to twenty-one days had passed, if we take the estimate of the Circuit Court of Appeals. Was that fair to the surety? Was that "prompt, vigorous action?" Was it reasonable or in accordance with the letter or spirit of the bond?

In the case of Innmann v. The Western Fire Insurance Company, 12 Wend. N. Y. 452, the Court said that even *one week* would not be "forthwith." In Edwards v. Lycoming Insurance Co., 75 Pa. St. 378, the Court held that a notice delayed *eighteen days* was not "forthwith." In Trask v. The State Fire Insurance Company, 29 Pa. St. Rep. 198, the Court held that a notice delayed *eleven days* was not immediate notice. In the Railway Passenger Association Company v. Burwell, 44 Ind. 460, it was held that a notice delayed *six days* was not "immediate" notice. In Harbour Commrs. v. The Guarantee Company of North America, 22 Canada Sup. Court, 542 (see note 19th C. C. A. 276), it was held that a delay of *a week* was not immediate notice. In the Queen v. The Justice of Berkshire, 4 Q. B. Div. 469, a delay of *four days* was held not to be immediate notice, the Court saying: "The words 'forthwith' and 'immediately' have the

same meaning. They are stronger than the expression 'within a reasonable time,' and imply prompt, vigorous action, without any delay, and whether there has been such action is a question of fact having regard to the circumstances of the particular case."

In the case of Streeter v. Streeter, 43 Ill. 155, the Court held that immediate notice had not the same meaning as the words "as soon as could practically be done." In our case the lower court in its charge to the jury told them that "immediate" notice meant "that it was the duty of the plaintiff in this case to give, as soon as was reasonably practicable, and with promptness notice of the discovery of any default;" that "immediate" notice meant "within a reasonable time." In this case there was no dispute as to the facts bearing on the question of the time of the Receiver's discovery of McKnight's defaults and the time he gave the notice. All the testimony on that subject was offered by the complainant, and there was practically no conflict in the evidence as to this point. In May on Insurance, Section 462, quoted by the Circuit Court of Appeals, it is said:

> "Whether due diligence has been used in giving the notice is a question which is ordinarily left to the jury to be found from all the circumstances in the case. Where the facts and circumstances bearing upon the question of due diligence are not in dispute, it becomes a question of law for the Court."

In the Pauly cases there was a conflict of evidence as to when the Receiver got notice of a default; but it was certain that the Receiver gave *a notice in two or three days* after the Examiner reported that there was a default. In our case, the Receiver, as he admits, kept pace with the Examiner, who discovered defaults in two weeks after the Bank was closed. McKnight was arrested one day after the Bank was closed, and yet *the Receiver's short letter was not written to the surety until thirty days after McKnight's arrest, and thirty-one days after the Bank was closed*, and at least ten to seventeen days after the Examiner and Receiver had discovered at least some of the defaults set up in this

action. Here there were not merely suspicions of fraud. The President was actually arrested for fraud the day after the Bank closed.

In the American Surety Company v. Pauly, 170 U. S. 160, it is said:

> "There was evidence tending to show that although the Receiver had reason, in the months of January, February, March, or April, 1892, to believe that there were *irregularities* on the part of Collins as President of the Bank, he did not become aware of any specific acts of *fraud* or dishonesty by him until the expert book-keeper employed to examine the Bank's books informed him *a few days prior to May* 23, 1892 [the date of the notice], that he had discovered false entries showing fraud and dishonesty on the part both of Collins and O'Brien."

In the American Surety Co. v. Pauly, 170 U. S. 139, the suit on the bond of Cashier O'Brien, Justice Harlan said:

> "The Receiver was not aware of 'the amounts or specific conditions' of such irregularities, nor of any specific act of fraud or dishonesty upon the part of the cashier, until the expert book-keepers had completed their examination of the books of the Bank *about May* 23, 1892, *on which day* the Receiver wrote to the Surety Company, etc."

In another place (p. 139) Justice Harlan said:

> "*Towards the end of May* the experts made certain discoveries involving the fidelity and integrity of O'Brien as cashier, of which Bloodgood gave notice to the Receiver [May 23d]."

In other words, the Supreme Court thought that the Receiver did not get notice of any default of the President or Cashier until a few days before he sent the letter of May 23d, and that that was immediate notice, or at least that the jury might find such notice to be immediate. In the McKnight case the directors and the Cashier had known of the Edmunds and the Britt and Reeder defaults for more than a year; and it was a matter which the Bank Examiner and the Receiver must have learned

immediately when the Bank closed and McKnight was under arrest for fraud, and they certainly knew of some one of these defaults at least two weeks before the letter was written, and may have known of them four weeks before. It seems clear, therefore, that the Court erred in allowing the Receiver in this case to offer his letter of February 18, 1897, as "immediate notice" under the contract. In some insurance cases the Courts have been indulgent where ignorant or unbusiness-like people have been a little slow in sending a notice, but here we have an expert, a Receiver who understands the meaning of words and the need of speed and the danger of delay, who waited unreasonably long before writing a short letter to the surety as a notice under the bond.

FIFTH POINT.

A claim against a Bank President's surety is not made "as soon as practicable" if not made till five months and a half after the bank is closed and the President is arrested for fraud, and four months and a half after a notice of the fraud is sent to the surety and nearly four months after an attachment suit has been brought by the Bank's Receiver against the President.

The claim made July 2, 1897, was too late. The language of the bond is that the Bank, after the "immediate notice" has been given, "shall file with the Company his or their claim hereunder, with full particulars thereof, *as soon as practicable thereafter.*" It was not proper for the Bank or the Receiver to wait until all was known of McKnight's defaults to file that claim. In the American Surety Company v. Pauly, 170 U. S. 146, it appears that the defaults of O'Brien were not discovered by the Receiver until some time after May 1, 1892. The first notice was sent on May 23, 1892, and later the formal claim or demand was made on June 24, 1892. In other words, the claim was made by the Receiver about thirty days after the notice of

May 23, 1892, and that delay of one month was held not to be too long.

In the McKnight case the claim was not made until about five months and a half after the Bank was closed, about four months and a half after the notice of February 18, 1897, was sent, and nearly four months after the Receiver, on March 6, 1897, had brought a suit against McKnight and attached his property. And in that suit the Receiver was seeking to recover against McKnight $6,989.00 for defaults, on which the surety has now been held liable. If the Receiver had such specific and accurate information on which he could sue McKnight on March 6, 1897, he should have made a claim against the surety at once. All of the defaults on account of which the Receiver sought at the trial to hold the surety did not amount to more than about $11,000.00, and of that sum $6,989.00 was embraced in the suit filed by the Receiver against McKnight on March 6, 1897. While the Receiver was taking attachments against McKnight's property, less than two months after the Bank was closed and a few weeks after the first letter had been sent to the surety, no claim was given to the surety sufficiently definite to enable the surety to protect itself by similar proceedings against McKnight. That certainly was not obeying the agreement in the bond "to file with the Company his or their claim hereunder, with full particulars thereof as soon as practicable thereafter."

Respectfully but earnestly we submit that this is a case in which a writ of certiorari should be granted, in order that the Supreme Court may establish a clear and wise rule for the guidance of everybody interested in the execution or construction of surety-bonds, and in order that the principles laid down in the Pauly cases may not be stretched to unforeseen and unreasonable limits.

EDWARD J. MCDERMOTT,
Counsel for Fidelity & Deposit Company of Maryland.

ST. JOHN BOYLE,
Of Counsel.

21453

No. 454.

MAR 25 1901
JAMES

By. of Boyle & McDermo

Supreme Court of the United States.

Filed March 25, 1901.

THE FIDELITY AND DEPOSIT COMPANY OF MARYLAND, - - - - - - - - *Plaintiff in Error,*

VERSUS

R. H. COURTNEY, RECEIVER GERMAN NATIONAL BANK, - - - - - - - *Defendant in Error.*

MOTION AND GROUNDS FOR THE SAME.

ST. JOHN BOYLE AND
EDWARD J. McDERMOTT,
Counsel for Plaintiff in Error.

W. M. SMITH,
Counsel for Defendant in Error.

JOHN P. MORTON & CO., PRINTERS, LOUISVILLE, KY.

21454

—IN THE—

Supreme Court of the United States.

THE FIDELITY AND DEPOSIT COMPANY OF MARYLAND, ... *Plaintiff in Error,*

VERSUS No. 454.

R. H. COURTNEY, Receiver, ... *Defendant in Error.*

MOTION.

Now comes the plaintiff in error and files herein a stipulation signed by all counsel interested and moves the Court to advance this case for hearing with the case of the Guarantee Company of North America vs. The Mechanics Savings Bank & Trust Company, No. 261, and to grant two hours' additional time to the counsel for the plaintiff in error herein and two hours' additional time for the defendant in error herein for the argument.

ST. JOHN BOYLE AND
EDWARD J. MCDERMOTT,
Counsel for Plaintiff in Error.

—IN THE—

Supreme Court of the United States.

THE FIDELITY AND DEPOSIT COMPANY OF MARYLAND, ... *Plaintiff in Error,*

VERSUS No. 454.

R. H. COURTNEY, Receiver, ... *Defendant in Error.*

STIPULATION.

It is agreed by the counsel herein that this case may be advanced, and heard and argued together with the case of the Guarantee Company of North America vs. The Mechanics Savings Bank & Trust Company, No. 261, if the Court will allow us at least one hour additional time on each side for the proper argument of this case.

ST. JOHN BOYLE AND
EDWARD J. MCDERMOTT,
Counsel for Plaintiff in Error.
W. M. SMITH,
Counsel for Defendant in Error.

21455

—IN THE—

Supreme Court of the United States.

THE FIDELITY AND DEPOSIT COMPANY OF MARYLAND, ... *Plaintiff in Error,*

VERSUS No. 454

R. H. COURTNEY, Receiver, ... *Defendant in Error.*

STIPULATION.

It is agreed by the counsel for the plaintiff and defendant in error in the case of the Guarantee Company of North America vs. The Mechanics Savings Bank & Trust Company, No. 261, that the case of the Fidelity & Deposit Company of Maryland vs. R. H. Courtney, Receiver, may be heard and argued together with said case of the Guarantee Company of North America vs. The Mechanics Savings Bank & Trust Company, if the Court will allow counsel therein such additional time as may be necessary for the proper argument thereof without restricting the time allowed us by the rules.

GUARANTEE COMPANY OF N. A.,
By WM. L. GRANBERRY, Attorney.

While I think I have nothing to do with this matter, it being purely a matter of discretion with the Court, I assent to it.

EDWARD H. EAST,
Attorney for Mechanics Savings Bank & Trust Co., etc.

Supreme Court of the United States.

THE FIDELITY AND DEPOSIT COMPANY OF MARYLAND, ... *Plaintiff in Error,*

VERSUS **No. 454**

R. H. COURTNEY, RECEIVER GERMAN NATIONAL BANK, ... *Defendant in Error.*

GROUNDS FOR MOTION.

The motion to advance this case and to have the same heard with the case of the Guarantee Company of North America vs. The Mechanics Savings Bank & Trust Company, for the use of James J. Pryor, Assignee, etc., No. 261, is made because several of the questions involved in the one case are also involved in the other; and, to hear the cases together, will save the Court time and labor. The main issues involved are of so much importance that they should be thoroughly argued and be finally and systematically determined for the guidance of all persons interested in bonds executed by bond-companies.

Both cases involve the following questions:

1. What degree of care or diligence is required of an employer to prevent defaults after he has agreed that he "shall observe, or cause to be observed, all due and customary supervision over the said employe for the prevention of default?"

2. What degree of information or knowledge of officers and directors of a bank of misconduct or default of an employe is sufficient to make it necessary for the Bank to give notice to a surety when the Bank has agreed to give notice of any misconduct or default that would make the surety liable?

3. If a surety, before renewing a bond for another year, asks whether the employe's accounts have been examined and his services have been faithful and satisfactory, and the surety is informed by the Cashier or President of the Bank not in collusion with the employe that his accounts have been examined, that they are correct, and that his duties have been faithfully and satisfactorily performed, when, in fact, he has been guilty of defaults which were either known to the other officers or directors or might by the exercise of ordinary care have been known to them, is the surety released?

4. If a Cashier or President or Director of a Bank knows or has reasonable ground to believe that another employe has been guilty of a default, or of such misconduct as would increase the risk of the surety, and, notwithstanding an agreement by the bank to give immediate notice of such default or misconduct, the Bank does not give any notice thereof to the Surety, is the surety released?

5. When the terms and meanings of a bond-contract are clear, has a paid surety or a bond-company the same rights, and can such surety be exonerated by the same defenses that will protect an unremunerated surety?

6. Is the knowledge of a President or a Director of a Cashier's defaults, or is the knowledge of a Cashier or a Director of a President's defaults the knowledge of the Bank, when there is no collusion between the offender and the officer having such knowledge, and when this knowledge is obtained at the Bank or in attending to the Bank's business?

7. When the surety writes to a bank for information as to the Cashier's discharge of his duties and receives a reply from the President that the Cashier has faithfully discharged his duties, or when information is asked as to the President and the Cashier replies that the President has faithfully discharged his duties, and when this information is known by the writer to be false, or, by the exercise of ordinary care, would be known to be false, and when there is nevertheless no collusion between the defaulting officer and the officer

sending the reply, is the letter received by the surety competent evidence? Or is there any difference in this respect between (1) a letter written by a President and (2) a letter written by a Cashier? Or by whom shall the letter be written to bind the bank? Is formal action of the Board of Directors authorizing such a letter necessary to make such a letter binding on the bank?

In addition to the foregoing questions common to both cases there are several questions in the case of the Fidelity & Deposit Company not in the case of the Guarantee Company of North America. For instance, in the former's case it is earnestly contended that the employer, in violation of the plain terms of its contract, (1) did not give immediate notice of the President's defaults as soon as the defaults were known, nor even give immediate notice after the receiver of the bank knew of them, and, (2) the receiver did not "file with the (surety) company his or their claim hereunder with full particulars thereof, as soon as practicable thereafter, etc.;" but, on the contrary, the Receiver delayed his so-called "immediate notice" not less than two or three weeks, and delayed his "claim" about four months and a half after the written notice had been given, and four months after taking an attachment against the defaulting officer.

There are other questions peculiar to the case of the Fidelity & Deposit Company, but they need not now be mentioned.

In order that all these questions may be heard with as little loss of the Court's time and effort as possible, we respectfully ask that these cases be heard together, and that additional time be granted to the counsel in this case.

Respectfully submitted,

ST. JOHN BOYLE AND
EDWARD J. MCDERMOTT,
Counsel for Plaintiff in Error.

No. 178.

FILED
FEB 18 1902
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States,

OCTOBER TERM, 1901.

Filed Feb. 18, 1902.

The Fidelity and Deposit Company of Maryland,

Petitioner,

VERSUS

R. H. Courtney, Receiver of the German National Bank of Louisville,

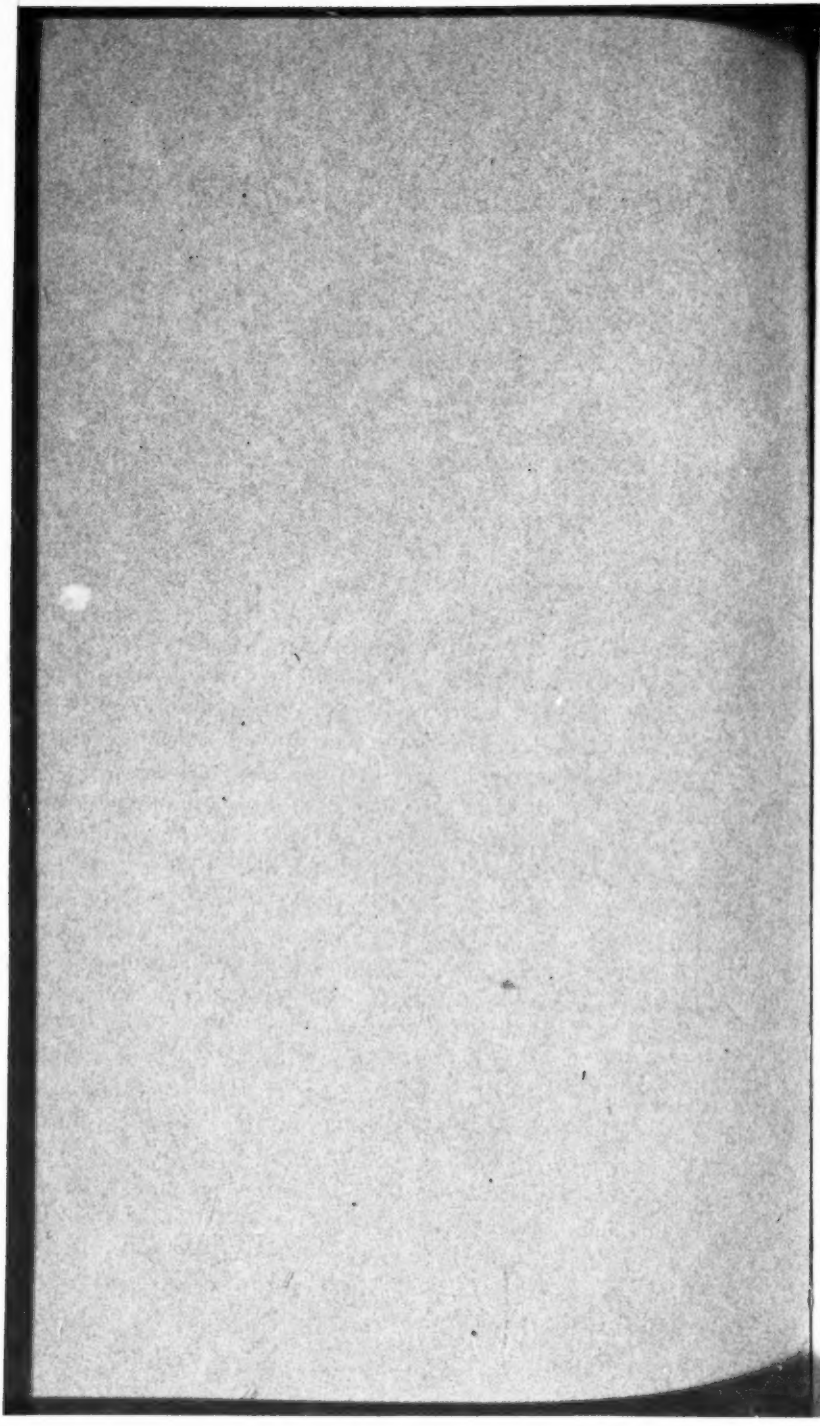
Respondent.

On Writ of Certiorari to the Circuit Court of Appeals for the Sixth Circuit.

BRIEF FOR PETITIONER.

ST. JOHN BOYLE,
EDWARD J. McDERMOTT,
THOMAS A. WHELAN,
Counsel for Petitioner.

JOHN P. MORTON & CO., PRINTERS, LOUISVILLE.



Supreme Court of the United States.

THE FIDELITY & DEPOSIT COMPANY OF MARYLAND, - - - - - - - - *Petitioner,*

VERSUS

R. H. COURTNEY, RECEIVER OF THE GERMAN NATIONAL BANK, - - - *Respondent.*

Brief for Petitioner.

STATEMENT.

The respondent, on February 5, 1898, filed in the United States Circuit Court for the District of Kentucky (Rec. 1) a petition against the Fidelity & Deposit Company of Maryland on a bond for $10,000.00 given by the said Company to the German National Bank, of Louisville, Kentucky, for the fidelity of J. M. McKnight, first as Vice-President and then as President of said Bank. The Fidelity & Deposit Company answered, and there was a trial by jury and a verdict and judgment rendered for the Receiver of said Bank for said sum against the petitioner. A writ of error was sued out to the United States Circuit Court of Appeals for the Sixth Circuit to correct the errors committed on the trial of said action in the admission and rejection of testimony and in the instructions of the Court. Thereafter, on July 13, 1900, said Circuit Court of Appeals affirmed said judgment of the United States Circuit Court for the District of Kentucky. On October 22, 1900, the plaintiff in error filed a petition in the Supreme Court of the United States for a writ of certiorari to the said Circuit Court of Appeals, and said petition was granted; and said writ and return were filed November 5, 1900.

A short time prior to June 1, 1894, J. M. McKnight was elected Vice-President of the German National Bank. At that time Adolph Reutlinger was President and a director of said Bank, and his son, Rudolph Reutlinger, was the Cashier. On June 1, 1894, J. M. McKnight, as Vice-President, gave to the

German National Bank of Louisville a bond in the sum of $10,000.00, with the Fidelity & Deposit Company of Maryland as its surety (Copy bond, R. 29). In January, 1895, McKnight became President and Adolph Reutlinger became Vice-President. McKnight remained President until the Bank was closed January 18, 1897. Adolph Reutlinger remained Vice-President until September 5, 1896, at which time he resigned. On June 1, 1895, McKnight's bond was renewed for a year (R. 32). On June 1, 1896, said bond was renewed for another year.

On January 18, 1897, the German National Bank was closed by the Controller of the Currency of the United States, and on January 22, 1897, R. H. Courtney, the plaintiff below, was appointed receiver of said Bank, and he brought this action on February 5, 1898, to recover of the surety the full amount of said bond for the various defaults and embezzlements of McKnight, which, it was then claimed, amounted to $18,742.74. Some of the items set up in the petition were abandoned by the Receiver at the trial, and no proof was offered as to them.

The Fidelity & Deposit Company in its original Answer denied knowledge or information sufficient to form a belief of all said alleged defaults and embezzlements of said McKnight. (R. 8.) Subsequently, with leave of the Court, the Fidelity & Deposit Company filed an Amended Answer (R. 11) in which the Company set up all the important provisions of the bond, and especially the following parts:

(1) "That the German National Bank shall [*a*] immediately give the Company notice in writing of the discovery of any default or loss hereunder, and [*b*] shall file with the Company his or their claim hereunder, with full particulars thereof as soon as practicable thereafter, and [*c*] no claim which shall not be so filed by the employer with the Company within six months after the expiration or cancellation of this bond, or within six months after the employe shall have ceased to be in the employer's service, shall be payable hereunder."

(2) "That upon notification to the Fidelity and Deposit Company of any loss hereunder, the said Fidelity and Deposit Company's liability shall thereupon terminate as regards any subsequent act of the employe, J. M. McKnight."

(3) "That the employer, the German National Bank, shall observe due and customary supervision over the employe, J. M. McKnight, for the prevention of default, and, if the employer,

the German National Bank, shall at any time during the currency of this bond condone any act or default on the part of the employe, McKnight, which shall give the employer, the German National Bank, the right to claim thereunder, and shall continue the employe McKnight, in its services without written notification to the Fidelity & Deposit Company, the said Fidelity & Deposit Company shall not be responsible hereunder for any default of the employe, McKnight, which may occur subsequent to such act or default so condoned."

(4) "That there shall be a complete inspection of the accounts and books of employe, McKnight, on behalf of the employer, the German National Bank, at least once in every twelve months from the date of this bond (June 1, 1894), such inspection to include examination of all cash or securities of which the employe, McKnight, shall have custody or charge.

(5) "That the employer shall at once notify the Company on becoming aware of the employe being engaged in speculation or gambling, or indulging in any disreputable or unlawful habits or pursuits."

The said Amended Answer set up that neither the German National Bank nor the Receiver thereof ever gave to the said Fidelity & Deposit Company, in writing, notice of McKnight's defaults as required; that the Bank did not observe due and customary supervision over McKnight for the prevention of his defaults; that the Vice-President, who was a director, the Cashier, and the Bank itself learned of all the alleged defaults and embezzlements of McKnight immediately after they occurred, and yet neither the Bank nor the Receiver notified the Fidelity & Deposit Company of any of them until long after the Bank was closed on January 18, 1897; that the first notice was an informal letter from the Receiver on February 18, 1897 (R. 34), and this letter did not give any of the particulars of McKnight's defaults and was too long delayed; that no demand with the particulars of the claim of the Bank or the Receiver was filed with the Fidelity & Deposit Company until July 2, 1897; that Rudolph Reutlinger was teller and cashier, and exercised the usual duties of such offices, and that his father was Vice-President and director, and that both were familiar with all the affairs and transactions of the Bank and with McKnight's doings and defaults, and that the directors were always kept informed of the notes and drafts discounted and the loans made and the overdrafts; that the directors and the Bank knew of, and, at the time,

condoned, the said defaults and embezzlements of McKnight, and allowed him to go on in his wrongful course without the knowledge of the said Fidelity & Deposit Company; that, during all the time McKnight was in office, first as Vice-President and then as President, the books of the Bank were out of balance $3,000.00, and were allowed to remain in that improper and dangerous condition; that the officers and directors of the Bank allowed McKnight to be constantly overdrawn in his accounts, and that his overdrafts on January 18, 1896, amounted to $1,340.14, and on January 20, 1896, amounted to $1,460.14, and that, day in and day out, he was overdrawn with the knowledge and connivance of the other officers and directors; that "by their irregular and improper practices the directors of said Bank encouraged said McKight in violating and neglecting his duty as President, and they condoned his misconduct and withheld said information from the defendant, and this defendant would have canceled said bond and would not have remained upon his bond if it had known of his said misconduct;" that, before each renewal of the bond in 1895 and in 1896, the said Fidelity & Deposit Company wrote to the Bank to know if McKnight had up to that time performed his duties properly, and was informed by the cashier and the other officers that McKnight had discharged his duties faithfully; but, on the contrary, the assertions and statements of the said Cashier and the other officers of the bank were false and fraudulent, and were known by them to be false and fraudulent, and misled the Fidelity and Deposit Company, which was relying on the same, and that but for said false and fraudulent statements the Company would not on June 1, 1895, or June 1, 1896, have renewed said bond for a year, and would have canceled said bond, and would thus have avoided nearly all of the losses described in the petition.

On May 1, 1899, the said Receiver filed a Reply (R. 20) which was wholly negative in effect, and on the same day the Fidelity and Deposit Company, with leave of court, filed another Amended Answer (R. 26) which set out more pointedly that the Bank had knowledge of McKnight's doing and defaults immediately after they occurred in the early part of 1896 and later, and that the bank and its officers condoned his defaults and never notified the Fidelity & Deposit Company thereof until

long after the Bank went into the hands of the Receiver in 1897, and that neither the Bank nor the Receiver ever gave the said Company a notice within a reasonable time of said McKnight's defaults and embezzlements, or any of them, and never filed a claim or demand therefor with said Company with full or any particulars thereof as soon as practicable thereafter nor before July 2, 1897, though said Bank and the Receiver knew specifically of said McKnight's act and defaults prior to January 22, 1897, and the Bank knew of many of them prior to January 22, 1896.

On May 2, 1899, the evidence was completed and the court gave its instructions to the jury (R. 48). *The Jury retired and, the first day, were unable to agree.* They were discharged until the following day. On May 3d they still seemed unable to agree, and thereupon they asked the court for additional instructions (R. 62). After receiving a further charge from the court, they rendered a verdict for $10,000.00 against the Fidelity & Deposit Company, the amount of said bond.

The bill of exceptions (R. 28) having been signed, sealed, and filed, the plaintiff in error on July 15, 1899, filed a petition for a writ of error (R. 55), and on the same day filed its assignment of errors (R. 55) and executed a supersedeas bond. The charge of the court, so far as necessary, is stated in the assignment of errors and will be quoted as the points argued are presented.

Specifications of the Errors Relied On.

We maintain that the court below erred as follows:

(1) It was error to admit in evidence as "an immediate notice" of McKnight's defaults the letter of R. H. Courtney, Receiver (Rec. 34), written to the surety February 18, 1897, more than a year after the Bank's cashier and directors knew of his defaults, and not less than two or three weeks after the Receiver himself had notice of them, and it was error in the Court to charge the jury in Instruction 2 (Rec. 57) that the words "the employer shall immediately give the company notice in writing of the discovery of any default or loss" mean "that it was the

duty of the plaintiff in this case to give as soon as reasonably practicable and with promptness notice of the discovery of any default" and that if the Receiver gave the notice "within a reasonable time," etc., it was sufficient. The strong word "immediately" used in the bond was not fairly defined in the charge, when said to be equivalent to the words "as soon as reasonably practicable and with promptness" or "within a reasonable time." Immediate notice implies prompt, vigorous action without any laches or needless delay.

(2) It was error to exclude from the jury (Rec. 46) the petition filed by the Receiver against McKnight on March 6, 1897, in the Jefferson Circuit Court to recover $6,989.00 for four of his defaults for which judgment is asked in this case on a bond for $10,000.00, and the Court erred in charging the jury in Instruction 1 (Rec. 56) that said petition "should have no effect in their deliberation in this case"; that "that was a suit, not upon this indebtedness except in respect to one particular item, that of $3,736.00, but was a suit upon other indebtedness," etc., and the same error was repeated in Instruction 3 (Rec. 57) where it was said that this suit (in the State court) "does not show any thing concerning the particulars of this debt, nor does it show that the plaintiff had known the particulars before this suit was filed." That petition showed that the Receiver knew of four large defaults on or before March 6, 1897, and yet he did not file his claim against the surety till July 2, 1897, although the bond required that the claim should be filed "as soon as practicable."

(3) It was error to instruct the jury in Instruction 3 (Rec. 57) that a claim made on the surety by the Receiver July 2, 1897, was made "as soon as practicable," although the Receiver knew of these defaults in January, 1897, or in the first week of February, and testified (Rec. 34) thus: "At the time we gave that notice [letter of February 18, 1897] we had examined far enough to know he [McKnight] was in default *far beyond the amount of the bond*" [$10,000.00]; and although the Receiver actually sued McKnight March 6, 1897, in the State court on four items sued for in this action and amounting to $6,989.00. The Court said:

"In this case the evidence, I think, will justify you in the conclusion that this claim was made as soon as particulars of this kind were known . . .; that with reasonable promptness, after the particulars of this claim were ascertained by the plaintiff, that his claim was made in such detail that no fault has been found with it so far as has appeared."

(4) It was error to exclude from the jury the letter of the Cashier (Rec. 43) written May 29, 1896, to the surety, stating in reply to a letter of inquiry from the surety to the Bank prior to a renewal of the bond that all moneys handled by McKnight had been accounted for; that his duties had been performed "in an acceptable and satisfactory manner," and that "we know of no reason why the guaranty bond should not be continued." This reply by the Cashier to an inquiry for information addressed to the Bank by the surety was excluded because the surety could not prove that the reply was sent after "there had been special authority from the Board of Directors of the said Bank, authorizing or directing the said Cashier to write such communication, and the court being of opinion that the Cashier had no such power by reason of his office," etc. (Rec. 44.)

(5) It was error to tell the jury in Instruction 5, (Rec. 58, 59, and 60), and in Instruction 6, (Rec. 60), that the knowledge of Vice-President Reutlinger and Cashier Reutlinger of McKnight's defaults, though gotten in the Bank, was not the knowledge of the Bank, and that the Bank could get knowledge only through its Board of Directors:

In Instruction 5, the Circuit Court (Rec. 60), says:

"Now, I suppose in this case, *if the Bank* had known that McKnight was making these drafts for these various fraudulent purposes, such as buying up Councilmen, buying up Aldermen, paying his own private personal debts; *if the Bank* had known that and consented to it, there would not have been a fraudulent act by McKnight for which the Bank could recover against this Company. But if you believe from the evidence that *the Bank* did not know of the fraudulent purposes for which these overdrafts were made; if the overdrafts were made in connection with this matter; if you believe *the Bank* did not know the fraudulent purposes, then that changes the result, because if *the Bank* did not know and still consented to it, it would not relieve the act

of McKnight from the character of being a fraudulent act. So that, as I view this case—you must remember, however, that you are the sole judges of the evidence in this case, its credibility—as I view this case, however, there would be no fraudulent acts upon McKnight's part, limiting my observations now to the overdrafts, there would be no fraudulent act upon his part merely in an overdraft, if there were no fraudulent intent behind it, which was concealed from the Bank." . . .

The defendant excepted because "the foregoing instruction did not submit correctly to the jury consideration of knowledge on the part of the officers or directors of the Bank other than McKnight, which they had or would have had if customary supervision had been exercised."

In Instruction 6 (Rec, 60), the Circuit Court said:

"I do not think that the knowledge of a cashier of a bank, speaking generally, if [is] the knowledge of the bank as to any matter that does not come within the customary or ordinary duties of a cashier or those which have been specially imposed upon him by the action of the Bank. I do not think Mr. R. E. Reutlinger in this case, in respect to any matter which he knew or could do, represented the bank, if it was outside of his ordinary duties; and I do not recall any thing that he knew, so far as the proof shows, that would in any wise affect the liability of the defendant in this case.

"The defendant objected to the foregoing portion of the charge on the ground that the knowledge of the cashier of the acts of McKnight in respect to his overdrafts and his transactions with Britt and Reeder and with Edmunds and Sachs, etc., was the knowledge of the Bank."

(6) It was error to tell the jury in Instruction 7 (Rec. 61) that the knowledge of Director Reutlinger and Director Reisch of McKnight's defaults, though such knowledge was gotten in the Bank itself, was not the knowledge of the Bank, and that such knowledge could not be imputed to the Bank or release the surety unless we could prove that the Board of Directors had such knowledge.

The Court, in its Seventh Instruction to the jury (Rec. 61) said:

"The testimony in respect to the knowledge of *the Bank* of the purpose for which the $2,000 was taken out at half past six or seven in the evening, I say the knowledge of the

Bank respecting that must be proven, in my judgment, in such a way as to satisfy the jury that *the Bank, as distinguished from any mere director of it,* knew of that transaction. . . . If you believe from the evidence that *the Bank* did know of this fraudulent purpose, and that this default of McKnight's, this fraudulent act of McKnight's in getting this $2,000, was known to *the Bank* at the time, then I instruct you that all of the liability of the defendant in this case would cease then, that being the earliest or one of the earliest, if not the earliest of all these transactions. If you believe from the evidence that this transaction was known and condoned by *the Bank* at the time, before these other transactions occurred, then the defendant in this case is not liable. But if you believe, on the contrary, that *the Bank* did not know it, that it was the fraudulent act of McKnight alone, not participated in by *the Bank—when I say the Bank, I mean the Bank, I do not mean any individual director*— then the defendant is liable.

"The defendant objected to that portion of the charge because it declared that the knowledge of an individual director or directors of the acts of McKnight was not the knowledge of the Bank, and the jury should have been instructed that the knowledge of the Vice-Persident, who was a director, and of Mr. Reisch, a director, should be imputed to the Bank itself; but the Court erroneously overruled the objection of defendant and let said instruction stand."

(7) It was error to tell the jury, in substance, first in the Fifth Instruction (Rec. 60) and later in the Eighth Instruction (Rec. 62), when they asked in writing whether the carelessness of the directors in the management of the Bank released the surety, that the carelessness of the directors in the management of the Bank was not a question for their consideration, and that it would not release the surety from liability on the bond, notwithstanding the fact that the Bank had agreed to use "due and customary supervision over the employe for the prevention of default," etc. The court had not defined "due and customary supervision." The jury evidently thought at first that to be "careless" was to fail to use "due and customary supervision over the employe," etc., and yet, after their written question was answered by the court, the jury evidently believed that, in the opinion of the court, the absence of "due and customary supervision" was of no consequence. The jury asked the Court in

writing the following question: "If the jury agree that the directors of the Bank were careless in the management of the Bank, are the jury to find for the defendant?" To this question of the jury the Court replied:

> "Gentlemen of the jury, no such issue as that stated in this question was presented. The mere question of whether or not the directors generally were careless in their management of the Bank is not a question for your consideration, nor would it exempt the defendant from the obligation imposed by the bond sued on. You have already been instructed as to the meaning and effect of the condition of the bond as to due and customary supervision, and outside of that there is no provision as to carelessness."

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In order to show, without undue repetition, the errors in the instruction, it will be best to give at once a *résumé* of the main facts contained in the bill of exceptions and relied on in the argument of the legal propositions advanced. All the evidence before the jury was the evidence of the witnesses of the Receiver.

RÉSUMÉ OF PROOF.

The bill of exceptions shows that there was a slight conflict in the evidence on a few points, but as to the main facts there is no dispute. I shall quote the exact language of the bill almost altogether in this résumé.

Adolph Reutlinger was an officer of the German National Bank more than twenty years before Mr. McKnight became an officer. Both Adolph Reutlinger and his son, Rudolph Reutlinger, were bank men of long and varied experience. In June, 1894, McKnight was elected Vice-President. Adolph Reutlinger was President. McKnight then gave the bond sued on herein; but we should have been able to prove, if allowed by the court, that the Bank selected the surety and paid the premium. In January, 1895, McKnight became the President and Adolph Reutlinger the Vice-President. The latter was a director from

the time McKnight came into the Bank to September 5, 1896. Rudolph Reutlinger, his son, was both cashier and teller until the Bank closed.

Adolph Reutlinger, the Vice-President and director, was paid by the German National Bank a salary of $1,500.00 per annum. He "had his desk in the banking room of the German National Bank, and used said desk daily during business hours." (R. 40.) "He was custodian of the Bank's cash reserve of many thousands of dollars, and he had the money in a box to which he alone had the combination." (R. 38.) "Adolph Reutlinger sometimes acted as cashier and teller for his son, Rudolph Reutlinger, while McKnight was President and in the summer of 1896 and prior thereto; Adolph Reutlinger was familiar with the management of the German National Bank during all the time that McKnight was there; . . . frequently examined the books of the Bank; kept the run of the bank and looked to see what notes were discounted by the Bank and what overdrafts existed." (R. 41.)

"It was the custom of the cashier to tell his father, the Vice-President, all that went on at the Bank, and he told his father when McKnight was overdrawn and whenever he discounted a note for him." (R. 38.) "The feeling between Adolph Reutlinger, the Vice-President, and McKnight was not friendly during the year 1896." (R. 38.) "The other employes in the Bank, and Vice-President and Director, Adolph Reutlinger, the father of the cashier and teller, also now and then helped the cashier and teller in straightening out his cash matters, and in that way now and then learned what checks were held back in the cash items." (R. 40.) On March 11, 1895, when the bond of McKnight was being considered because it would have to be renewed on June 1st, 1895, for another year, Adolph Reutlinger wrote to the Fidelity & Deposit Company as follows: "We have about three examinations by the Government a year, and also have frequent periodical examinations." (R. 33.) This letter showed that the Bank officers (rather than McKnight himself) were taking an interest in and attending to the execution of his bond.

The defaults and misdoings of McKnight complained of in the petition began in 1895; but the plaintiff abandoned all the

items prior to 1896. On January 14, 1896, the Hon. Henry S. Tyler, who was then Mayor of Louisville, died. "McKnight became a candidate for the vacant position . . . to be filled by the General Council of the City of Louisville. . . . Among the members were men named Jenne, Sowders, Glover, and Adams; . . . Said four members demanded the payment of one thousand dollars for their use and benefit before they would agree to vote for McKnight and . . . said Edmunds so informed McKnight, who directed the cashier and teller (Rudolph Reutlinger) to take one thousand dollars to another bank and get for Edmunds ten bills of one hundred dollars each, which he did, and delivered said ten bills to the said Edmunds, who took the same and distributed it among the four members, etc." (R. 35.) They signed a pledge to vote for McKnight. "There was testimony conducing to show that said Vice-President . . . heard said McKnight tell the cashier to go out and get said ten bills of one hundred dollars each for said Edmunds; that said Edmunds was a prominent factor in said McKnight's race for Mayor, and was frequently in the Bank during that time; that there were frequent meetings in the bank of persons interested in his candidacy; that during that time Edmunds was frequently seen in conversation with Adolph and Rudolph Reutlinger." (R. 36.) "The contest for Mayor and the subsequent controversy were matters of general notoriety and were discussed in the newspapers, and the said Edmunds was frequently in the Bank conferring with McKnight upon these subjects, and was often seen by, and had conversations with, the Vice-President and directors and the other officers of the Bank, *who knew the purposes of his visits.*" (R. 37.)

For the one thousand dollars given by the Cashier in ten one-hundred-dollar bills to Edmunds, the political manager of McKnight in his race for Mayor, in the heat of the canvass, with the knowledge of the Vice-President and director, he, Edmunds, at the instance of McKnight, gave his individual check on the Bank for one thousand dollars, and Edmunds testified "that he understood that the check was to be taken care of by McKnight." (R. 36.) "The cashier, who was also the teller of the Bank, carried this Edmunds check, at the request of McKnight, as a cash item in his drawer until March 12, 1896—nearly two

months—on which day it was charged to the account of S. E. Edmunds & Company by order of the President, J. M. McKnight." (R. 35.)

It is true that the Cashier and the Vice-President pretend that, in spite of all this, they did not know, at the time, what this money was to be used for; but this court will not believe that men, who had sense enough to be the general officers of a Bank and who must have known something about politics, were ignorant of the purpose which a political leader had, when, in the midst of a race before a Common Council, *he was particular to call for ten one-hundred-dollar bills*, and to need them in that form so badly that the cashier of the Bank had to go out to another bank in the City and get bills of *that exact denomination* for the use of the President, who was the candidate.

J. M. McKnight "was overdrawn in large sums of money from July, 1895, up to fifteen days before the Bank was closed; . . . his overdrafts were frequently as high as $1,200.00; he was overdrawn nearly every day during that period. . . . Mr. Adolph Reutlinger, the Vice-President and director, knew this—the other directors knew of these overdrafts as well as the cashier and teller. . . . The overdrafts of the said McKnight were offered in evidence by the attorney for the plaintiff (the receiver), and it appeared therefrom that the said McKnight had overdrawn his account from the time he became employed by the Bank to the time of the appointment of the Receiver, with the exception of occasional periods." (R. 41.)

On January 21, 1896, J. M. McKnight gave his check for $1,253.00 to the Messrs. Sachs to pay a private claim against himself, and this check on the German National Bank was carried by the cashier and teller as a cash item in his drawer for the benefit of McKnight until March 12, 1896—about seven weeks—and then, at the request of McKnight, this check was charged to the account of S. E. Edmunds & Company. This was done by the bookkeeper on the order either of McKnight or the cashier. "The Vice-President saw McKnight's checks to Sachs for $1,253.00 on the file of the cashier; that it was being held up by the cashier as a cash item; the Vice-President asked the cashier and teller why he was doing that; . . . and said

cashier and teller said he was doing it at the request of McKnight." (R. 38.)

After McKnight was beaten by Mr. Todd in the race before the General Council for Mayor to fill the unexpired term of Mr. Henry S. Tyler, "there was great dissension between the said Todd and the Board of Aldermen and Councilmen, and a majority of the Board of Aldermen—seven in number—were opposed to the Mayor and determined to block legislation proposed by him. Mayor Todd, however, began to make inroads on the opposition to him, and while five of the seven members were working in harmony with him, there were two—Messrs. Britt and Reeder—who were considered wavering, and efforts were made to get them to unite with the five; said S. E. Edmunds acted as a go-between in the negotiations with them; and the said McKnight drew up a paper, intended to be signed by the seven Aldermen, pledging themselves to stand together in their contest against the Mayor, but Britt and Reeder refused to sign the paper unless each of them received $1,000; said Edmunds informed McKnight of this fact, and thereupon the said McKnight requested R. E. Reutlinger, the cashier and teller, to remain at the Bank and keep the vault open after the regular time for closing; McKnight then told the said Cashier 'that he (McKnight) had *a big scheme on hand*, and that it was a big thing;' but did not further explain it; said McKnight caused said Britt and Reeder to be brought to the Bank by said Edmunds at or about 6:30 P. M. on February 6, 1896; said Edmunds, in the presence of said Cashier and said Britt and Reeder, prepared the note hereinafter given, and said Britt and Reeder signed it, and then they went upstairs and signed the agreement hereinafter given, and then the Cashier handed Britt the two thousand dollars in currency by direction of McKnight." (R. 36.) This note was for two thousand dollars, and was due one year after date, *and bore no interest until after maturity and no discount was charged or collected.* In other words, the Cashier knew that the Bank was lending $2,000.00 of its money for one year without interest to two members of the Board of Aldermen before which President McKnight had just been a candidate for Mayor. There was also testimony conducing to show that,

while in the Bank building, Edmunds got $225.00 of this money from Britt and Reader. (R. 37.) In the agreement signed by Britt and Reeder with five other members of the Board of Aldermen, they bound themselves to stand together in all matters before the Board of Aldermen, and to caucus with McKnight before acting. As appears on page 37 of the Record, these controversies between Mayor Todd and McKnight were matters of general notoriety, and were discussed in the newspapers, and, of course, the Cashier and his father, the Vice-President, and the other directors knew all the main facts just as the public did.

The Cashier understood so well the extraordinary nature of this proceeding that he went that evening at 9.30 P. M. to his father's house to tell him, the Vice-President, what had occurred. (R. 37.) "The next morning the Vice-President, Adolph Reutlinger, asked McKnight for an explanation of the matter. McKnight responded that the transaction was all right and that the note was good, and that it would be [in the indefinite future] guaranteed by men of credit, whom he named." Said Adolph Reutlinger, was not, however, satisfied, and notified other members of the Board of Directors, and shortly afterward brought the matter before the Board for its consideration; whereupon McKnight made the same explanation that he had before, and it seemed to satisfy the Board, although the Bank was to get no interest on its $2,000.00 for one year, even if it received the principal. On the morning after Britt and Reeder got the money Vice-President Reutlinger "approached McKnight about the said matter, and McKnight had a long yellow envelope in his hand, and he told the Vice-President that 'those *fellows* had signed it, and that he would not sign that for the City of Louisville;' that 'he had a document there in his pocket which was signed by those fellows;' that 'he had a meeting upstairs and that paper was signed, and he would not sign it for the City of Louisville;' McKnight did not mention the names of the persons who had signed it, but this conversation was had with him by the Vice-President when the Britt and Reeder matter was being discussed." (R. 37–8.) Adolph Reutlinger "noticed that the Bank was to get no interest whatever on the loan to Britt and Reeder for a year; . . . knew that this was an unusual

bank transaction and that there was no promise by McKnight to pay that interest, and no explanation made to him or to the Board of Directors of the interest feature of the transaction." Director Reisch stated that "two or three days after the Britt and Reeder note was executed," "old man Reutlinger" told him: "he said the Bank was opened about six o'clock that night, and Britt and Reeder *and the whole gang there;* he gave a note and got $2,000.00 out of the Bank . . . I just heard after that it was for the Council race, the Todd race, something like that . . . I heard that three days after the money was out of the Bank . . . that the Bank was open after six o'clock, and they got $2,000.00 out of the Bank." The attorney of the Receiver examined Mr. Reisch as follows:

Ques. Now, when was it you heard that that money was intended for the Todd race? . . . Ans. At the same time; old man Reutlinger told me that the same time. . . . That the money was used for the Mayor's race—for the Todd race. . . . Ques That it was money used in that race? Ans. Yes, sir. . . . Ques. Are you certain Mr. Reutlinger told you that? Ans. He told me, not in the Director's meeting, he told me that outside. . . . Ques. Were you in the Director's meeting when that note was considered? . . . Ans. Yes, sir, I believe that note did come up, and McKnight said if Reeder did not pay it, he would.

This testimony shows beyond question that Mr. Reisch, the director, knew three days after February 6, 1896, that McKnight had taken $2,000.00 of the Bank's money under the most extraordinary circumstances, and had given it to two members of the General Council without security and without any interest for a year, and *that the money was used for political purposes*; and it is certain, also, that the matter was brought before the Board of Directors; and, though it is said that McKnight pretended that Britt and Reeder were good for the money, still he never did get any other names on the paper, as he told the directors he would do; and of course, they knew of this default on his part. Besides, he never did give them any explanation why the $2,000.00 of the Bank's money had been lent out without interest for a year. The Vice-President, a bank officer, admits that this was a queer Bank transaction and that he brought it up before the Board because he was not satisfied with

McKnight's flimsy explanation; and yet he knew that McKnight, a few weeks before, had been a candidate for Mayor before the very Board of which Britt and Reeder were members; and, though he knew from his son that Edmunds, who had gotten $1,000.00 while McKnight was running for Mayor, was in this deal, yet, in spite of all this, he pretends that he did not know about McKnight's fraudulent scheme when he had "the gang" upstairs and had gotten them to sign a paper which he "would not have signed for the City of Louisville." There was abundant evidence here on which a jury might have found that two directors, Vice-President Reutlinger and Director Reisch, and the Cashier, Rudolph Reutlinger, and, in fact, the whole Board of Directors, had complete notice of the corrupt purpose and transparent fraud of McKnight; and, under the contract of the Bank with the Fidelity & Deposit Company, it was then their duty to notify the Fidelity & Deposit Company of the whole transaction.

On March 12, 1896, J. M. McKnight also gave another check for $1,650.00 to Messrs. Sachs to pay his private indebtedness, and this also, at his request, was charged to the Louisville Deposit and Collateral Account, in which McKnight had no interest whatever. On June 8, 1896, McKnight gave to the Union National Bank, for Embry, a check on the German National Bank for $3,736.00, and this check, by the request of McKnight, was charged to E. G. Williams, Special (R. 48). The Vice-President and the Cashier knew very well that McKnight had no interest in that E. G. Williams, Special, account; that the Bank alone was interested in that account, and, therefore, that McKnight had no right to charge any money to it. On November 21, 1896, McKnight surrendered some notes signed by S. E. Edmunds & Company, in which firm he had an interest, and caused Edmunds alone to execute notes in the place of them (R. 48). On January 4, 1897, McKnight drew a check on the German National Bank in favor of the Union National Bank, but really for Embry, for $379.96 (R. 39), and this also, at his request, was charged to E. G. Williams, Special, in which he had no interest, as all the officers of the Bank knew.

At divers times the Cashier paid small checks for McKnight and kept a mere memorandum of them as cash items in his

drawer. The Cashier, of course, knew that this was an irregular and improper way of doing business. One of these cash items was on January 12, 1896, for $45.00; two on April 15, 1896, for $25.00 each; and on May 21, 1896, there were four items, one for $76.00; one for $47.15; one for $10.00, and one for $15.00. At all these times, as shown above, McKnight's account was largely overdrawn, and yet the Cashier was carrying these checks as cash items. The whole course of affairs showed that the Cashier and the Vice-President knew of McKnight's irregularities and misdoings, and, *as the Vice-President was not friendly with McKnight*, he, the Vice-President, no doubt reported these matters to the other directors, as it was his duty to do and as he admits he did in the case of the Britt and Reeder note.

In spite of the contract of the Bank with the Fidelity & Deposit Company that it would "observe, or cause to be observed, due and customary supervision over the employe (McKnight) for the prevention of default," and that if the Bank "at any time during the currency of this bond condoned any act or default on the part of the employe which would give the employer (the Bank) the right to claim hereunder, and should continue the employe in its services without written information to the Company, the Company would not be responsible hereunder for any default of the employe which may occur subsequent to such act or default so condoned"—in spite of this distinct contract by the Bank with the Fidelity & Deposit Company, there was (to quote the bill of exceptions) "testimony conducing to prove that the management of the German National Bank by its directors was careless or negligent, and that they did not observe or cause to be observed due and customary supervision over the employe for the prevention of default, and there was evidence conducing to prove that there had not been a complete or customary inspection of the books of said McKnight on behalf of the said Bank once in every twelve months during the continuance of the bond, etc." (R. 43.) There was no notice to the surety of all or of any of these acts. Good faith was not observed toward the surety at all. The officers and directors either purposely concealed all these acts from the surety, or purposely closed their eyes and refused to recognize what any intelligent man must have recognized under the same circumstances.

The Bank was closed on January 18, 1897, by order of the Controller while an examination was going on by Mr. Escott, a National Bank Examiner. McKnight, because of the discovery by the Examiner of his defaults, was arrested the day after the Bank closed. (R. 35.) The Receiver was appointed on January 18, 1897. (R. 33.) He took possession of the Bank on January 22, 1897. The Receiver said: "Almost immediately after the Bank passed into my hands, as Receiver, I began to ascertain the defalcations. The experts, Mr. Hays, a Government Expert, and Mr. Escott, a National Bank Examiner, were at work immediately after Mr. McKnight's arrest. I kept pace with their investigations. It was almost immediately after the Bank closed that these defalcations became known, not all of them, but enough to ground the claim upon." "About a week before it was closed Mr. Escott was at work in the examination; that is my recollection—about a week before." Mr Escott, the Examiner, said: "Mr. McKnight was arrested the following day after the closing of the Bank. We began to get these shortages about two or three weeks after the Bank was closed; they were discovered from time to time—I began to discover them in two weeks."

The Bank was closed on January 18th. (Rec. 74.) The informal letter of the Receiver, sent as an "immediate notice," was not mailed to the Fidelity & Deposit Company until February 18, 1897, a month after the Bank was closed and McKnight was arrested. The letter itself only states that Mr. McKnight "has been found in default to this Bank, and that you will be required to make an indemnity to me as a Receiver to the extent of said bond."

On March 6, 1897, the Receiver filed a suit against McKnight and took an attachment on his property (R. 46), and in that suit the Receiver, though by that time in full possession of all the facts, sought (*a*) to recover $1,000 00 on a note executed by McKnight to the German National Bank on March 19, 1895; (*b*) to recover $300.00 on a note executed by McKnight to the German National Bank on March 16, 1896; (*c*) to recover $2,253.00 with interest from January 21, 1896, for the $1,000 00 paid to Edmunds and the $1,253.00 paid to the Messrs. Sachs; (*d*) to recover $3,736.60 paid by the German National Bank on

a check drawn on it by McKnight, payable to the Union National Bank for the benefit of Embry. In other words, four of the items set up in that suit in the State Court against McKnight, amounting to $6,989.00, were the same items later set up in the petition in the U. S. Circuit Court against the Fidelity & Deposit Company for the amount of the bond, to wit, $10,000; and yet no demand was made on the Fidelity & Deposit Company for the items set up in the petition, aggregating $18,742.74, before July 2, 1897—although the Bank in its contract with the Fidelity & Deposit Company agrees that it, "the employer, (*a*) shall immediately give the Company notice in writing of the discovery of any default or loss hereunder, and (*b*) and shall file with the Company his or their claim hereunder with full particular thereof as soon as practicable thereafter." While the Receiver was taking attachments against McKnight's property, less than two months after the Bank was closed and a few weeks after the first letter of was sent to the Fidelity & Deposit Company, no claim, until July 2, 1897, was given to the surety sufficiently definite to enable the surety to protect itself by similar proceedings against McKnight.

The Contracts of Bond Companies, when the Meaning is Clear, Must be Firmly Enforced.

The questions involved in this case touch the life of bond-companies, and go to the root of the law of suretyship as applied to them. If the decision in this case be allowed to stand, there can rarely be a defense to an action against a bond company as a surety; and, in spite of contract rights, to go on a bond will mean in most cases to pay all losses, no matter how unfair, negligent, or reckless the persons getting the bond may be. The result will be that the premiums for bonds must become higher or the companies must quit business. The loss in the end will fall on employers of ordinary care and honesty who do not need, and do not ask, to be protected against their own bad faith, gross neglect, or gross folly.

Several of the most important questions involved in this case were also directly presented in the case of the Guarantee Company of North America v. The Mechanics Savings Bank & Trust Company, decided by this court on January 6, 1902. The

main questions involved in that case are the same as several important questions in this. In both cases the court below had to decide what is "due and customary supervision" over an officer in a bank, what notice to a surety of an officer's misconduct good faith requires, and how far knowledge of one officer or director is to be treated as knowledge of the bank or the board of directors. The true meaning of the American Surety Company v. Pauly, 170 U. S. 160, has been made clearer by the case just cited. According to the principles of those cases, the petitioner in this case should have been exonerated. In spite of a strongly adverse charge in the circuit court—in spite of the natural prejudice of a jury against a corporation like a bond company—the jury evidently wanted to find a verdict for the surety; because the jury were long hung and, on the second day, would not find for the Receiver without asking for a further charge; and the second charge was so strong against us that they evidently felt that there was nothing else to do but find a verdict for the Receiver, even though it were not consonant with their own ideas of justice.

In the argument in the Circuit Court of Appeals the question came up whether the rights of a bond company as a surety were different in any respect from the rights of an individual bound as a surety. Only one difference has been or can be logically made. It has properly been held that where the construction of the contract of the surety company is doubtful, it will be construed against the surety, because such a contract is prepared by skillful attorneys of the surety company, and, in such a case, surety companies will be treated as insurance companies are treated; but a surety company, like anybody else, has a right to limit its liability by contract, and, when the contract is clear, it must be enforced. It can not be ignored or brushed aside merely because the contract was made for a consideration. All contracts are based upon a consideration, and, except in ascertaining what the meaning of the contract is, no distinction can be drawn between the contract of an individual surety and the contract of a corporation surety. The essential contract rights of corporations and individuals, under like circumstances, must be the same wherever impartial courts enforce the law. In the case at bar it is not pretended that there is any ambiguity in the con-

tract. The meaning is clear, and the only question is whether this clear contract shall be reasonably and fairly enforced. We are only asking that facts, which would have exonorated a private surety without compensation under all former decisions, shall also exonorate the Fidelity & Deposit Company, which went on the bond for a small fee. We only ask that we shall be held entitled to the same good faith and the same notice that any private surety would have been entitled to, and without which the surety would have been released. All this should be made plain by the Supreme Court for the guidance of the bond companies and the courts.

In times past, courts, in determining the rights of private persons who have become bound as surities, have not sought to ascertain whether the surety became bound for a good or a valuable consideration, nor to whom nor from whom the consideration moved. Whether a surety signed for money or on account of friendship was not inquired into, and made no difference in his rights, and would make no difference in his rights to-day. The courts have never attempted to make distinctions between valuable considerations in any form of contracts, and whether the Fidelity & Deposit Company was or was not paid to sign McKnight's bond can not be considered in this case.

Happily this court in the case of the Guarantee Company of North America v. The Mechanics Savings Bank and Trust Company, in construing a contract in its main features identically the same as ours, has condemned efforts "to refine away" the rights of these sureties. After quoting from the Pauly case the rule to be observed where the terms of the bond are ambiguous, the Chief Justice, that the rule might not be stretched beyond proper bounds, said:

> "But the rule can not be availed of to refine away the terms of a contract expressed with sufficient clearness to convey the plain meaning of the parties and embodying requirements, compliance with which is made the condition to liablilty thereon. Whatever the common law duty on the part of the employer to notify the guarantor of the fraud or dishonesty of the employe whose fidelity is guaranteed, the parties to the contract undertook to declare the duty of the bank to the company in certain specified particulars. It required that the employe should not have been guilty of previous default or dereliction within the

> knowledge of the employer. It provided for notification of any act of the employe which might involve a loss, without unreasonable delay after the occurance of the act came to the knowledge of the employer. . . . The question was not merely whether the conduct by the bank was contrary to the nature of the contract, but whether it was not contrary to its terms."

This court fairly but inexorably enforced the plain letter of that contract. The court did not refine away its provisions.

In the case of Rice v. the Fidelity & Deposit Company, 103 Fed. Rep. 427 (1900), the Circuit Court of Appeals firmly enforced the agreement between the employer and the surety to the effect that the "statement," which said that the bookkeeper would countersign all checks of the employe, should be the basis of the bond and its observance a condition precedent to recovery on the bond.

This court knew that bond companies serve a useful purpose. They are in their infancy. Unless their premiums are increased it is doubtful whether many of them can live. The percentage of loss would be enormous if employers could be negligent or reckless and yet hold the surety for embezzlements that could be prevented by ordinary care. The desire or demand on the part of the public for suretyship or guarantyship by corporations rather than by private individuals is steadily increasing, and surely the courts should do nothing to prevent the gratification of such a reasonable desire. The competition between the companies, of which there are now a great many, will inevitably reduce the cost of the premium in each case to the lowest point consistent with reasonable profit. The action of competition in this way can be relied on with perfect confidence. Hence, in a short time the premium will become so small that it will merely cover the risk of loss, when there has been reasonable care on the part of the employer to prevent loss. If the courts, however, lay down all the bars and say that the surety must pay, practically in every case, no matter how gross the carelessness or negligence of the employer may be, these companies must either go out of existence or the rate of insurance or premium must become so high that it will be a great burden upon the people of ordinary honesty and reasonable diligence. It would be highly inequitable

and unwise to make such suretyship too expensive for diligent and business-like men in order that there might be absolute protection for those who are totally negligent and unbusiness-like, and who invite, by their want of care and good sense, the defalcations of their employes.

It is not contended that employers must use such care and intelligence as will render defaults almost impossible or very rare. It is only contended that it is for the benefit of everybody but the incompetent or the slothful that employers who take bonds must still show reasonable attention and diligence in guarding against the defaults of their servants; and that sureties, whether private individuals or corporations, shall be treated with candor and fairness. To allow reckless employers to hold sureties in nearly all cases will encourage fraud and crime—will multiply temptations to unwatched employes and increase the cost of a surety to thrifty and conscientious employers. *Et ne nos inducas in tentationem.*

FIRST POINT.

Immediate notice of McKnight's defaults was not given the Surety by the Bank or the Receiver. The words "immediate notice" are stronger than the words "as soon as reasonably practicable and with promptness" or "within a reasonable time"; and "immediate notice" implies prompt, vigorous action without any laches or needless delay; and where there is no dispute as to the facts, this question is one of law; and two or three weeks' delay in writing a short letter as a notice to the Surety after fraud has been discovered is not "immediate notice."

Under the bond the surety was entitled to immediate notice of the discovery of McKnight's first default (1) from the Bank in January, 1896, but certainly (2) from the Receiver in January, 1897. That notice was not given, and the Circuit Court of Appeals has decided in this case that "immediate notice" is the same as the words "as soon as reasonably practical and with promptness" or "within a reasonable time." We respect-

fully submit that that is not consonant with the authorities. The bond provides as follows: "That the German National Bank shall (*a*) immediately give the Company notice, in writing, of the discovery of any default or loss hereinafter, and (*b*) shall file with the Company his or their claim hereunder, with full particulars thereof, as soon as practicable thereafter," etc.

Here two things are stipulated for: (1) an immediate notice, and (2) a claim "as soon as practicable thereafter." The circuit court in the charge to the jury, and the Circuit Court of Appeals have in effect decided that the word "immediate" is exactly the same in meaning as the words "within a reasonable time," or "as soon as practicable thereafter"; and yet the difference between these words is here brought into sharp contrast by the contract itself. The parties in interest evidently intended to make a clear distinction, which the court has ignored.

It is manifest that Vice-President and Director Reutlinger, and Cashier Reutlinger and Director Reisch, knew of McKnight's defaults in January, 1896, and hence an "immediate notice" at that time should have been sent to the Surety by the Bank. If we concede, however, merely for the sake of argument, that the knowledge of these officers of the Bank was not the Bank's knowledge, still the Surety was entitled to immediate notice from the Receiver in this case, and such immediate notice was not in fact given. We were entitled to notice as soon as he discovered a single default—"any default or loss" for which we could be held bound. He could not wait till he discovered all. If, as the Circuit Court of Appeals has held, a letter such as Receiver Courtney wrote to the Surety on February 18, 1897, is sufficient in form and substance, there is no reason why such a letter could not have been written and sent through the mail within one day or two days after his discovery of the first default. The writing of such a letter was a matter of a few moments, and such an important business transaction, so easily attended to by him and so vital to us, should not have been delayed a day. The Circuit Court of Appeals admits that he delayed the writing of such a short note without any excuse whatever for at least two or three weeks. That was not good faith to the Surety, and was not a compliance with the bond. It was highly important to the

surety that it should know of its peril immediately after the Bank Examiner first discovered a default, or at least immediately after the Bank was closed January 17, 1897, and McKnight (the following day) *was put in prison for his frauds*. The Receiver certainly knew of these facts as soon as he was appointed, Janu-18, 1897, or as soon as he took charge of the Bank, January 22, 1897. The surety should have been allowed a chance at once to take steps to secure indemnity from McKnight or to attach his property. To keep the surety in the dark for a month or for even two or three weeks, while McKnight's property could easily have been put beyond the reach of the surety, when the Receiver had only to spend five minutes in writing such a notice as he sent to the surety, was unreasonable and unpardonable. It was not immediate notice, and it was in clear defiance of the plain letter and spirit of the bond. The Receiver might with reasonable excuse have delayed two or three weeks to make out a formal claim and prepare proofs and get exact information for such a document, but he did not need a single day for the petty task of writing such a letter as he in fact wrote on February 18, 1897.

The trial court, in Instruction 2, said to the jury (Rec. 57):

"It [the clause about immediate notice] did not mean that as soon as one [default] was suspected that notice should be given, but if you believe from the evidence that *within a reasonable time* after the Receiver in this case—and you must remember that he is the receiver merely, and that he knew nothing about the management of this Bank, nothing of its affairs until he was appointed—if you believe that *within a reasonable time* after he discovered, actually discovered, a default, he gave the notice of the 18th day of February, 1897, you are at liberty to infer that that part of the obligation of this bond has been performed."

Bouvier's Law Dictionary, quoted by the Circuit Court of Appeals, says: "The words 'forthwith' and 'immediately' have the same meaning. They are stronger than the expression within a reasonable time,' and imply prompt, vigorous action, without any delay, and whether there has been such action is

a question of fact having regard to the circumstances of the particular case."

In other words, this authority does not agree with the opinion of the Circuit Court of Appeals and the circuit court that the word "immediately" means only "within a reasonable time." If, as the Circuit Court of Appeals admits, the Receiver and the experts "began to discover them (the defaults) two or three weeks after the bank was closed," or in other words, that "the discovery was first made between the second and ninth of February, 1897," and yet that the Receiver did not write his short note to the surety until February 18, 1897, that certainly was not "prompt, vigorous action without any delay." That was gross laches, and a great wrong to the surety. No excuse whatever has been offered for the long delay of so simple a matter.

The Circuit Court of Appeals said:

> "We have already said no notice is required until the Bank had knowledge of facts which would justify it in charging dishonesty. . . . Assuming that the defalcations were becoming apparent to the experts so that they began to discover them two or three weeks after the Bank was closed, we can not say as a question of law that such facts had been discovered as would justify a prudent man in charging another with dishonesty so as to require notice, etc."

It is clear that the Bank had knowledge of the Edmunds fraud and the Britt and Reeder fraud in January, 1896, and that these facts would have justified it in charging dishonesty on the part of McKnight, and that was a year before the Bank was closed; but even the Receiver, after it was his duty to give an "immediate notice," delayed too long, for it is conceded that the Bank, because of an examination by the Bank Examiner, and the discovery of fraud, was closed on the 18th of January, 1897. "Mr. McKnight (Record 43) was arrested the following day after the closing of the Bank." In other words, McKnight was promptly charged with dishonesty. Evidently "such facts had been discovered as would justify a prudent man in charging him with dishonesty." The Receiver himself said (Rec. 42): "Almost immediately after the Bank passed into my hands as Receiver I began to ascertain the defalcations. . . . The experts were at work immediately after Mr. McKnight's arrest. *I kept pace with*

their investigation. It was almost immediately after the Bank closed that these defalcations became known, *not all of them, but enough to ground the claim upon.*" The Examiner himself said: "We began to get these shortages about two or three weeks after the Bank was closed. They were discovered from time to time. I began to discover them in two weeks."

With the Bank closed by the Controller of the Currency for fraud after a previous examination by the Bank Examiner; with McKnight under arrest evidently for such fraud, and with the Receiver fully informed of the very first discovery of the frauds, which must have been discovered even before two weeks, but which were undoubtedly discovered in two weeks after the Bank closed, the Receiver, though bound to give us immediate notice, would not undertake the petty labor of writing eleven lines to us until two or three weeks had passed—until from fourteen to twenty-one days had passed, if we take the estimate of the Circuit Court of Appeals. Was that fair to the surety? Was that "prompt, vigorous action?" Was it reasonable or in accordance with the letter or spirit of the bond?

In the case of Innmann v. The Western Fire Insurance Company, 12 Wend. N. Y. 452, the court said that even *one week* would not be "forthwith." In Edwards v. Lycoming Insurance Co., 75 Pa. St. 378, the court held that a notice delayed *eighteen days* was not "forthwith." In Trask v. The State Fire Insurance Company, 29 Pa. St. Rep. 198, the court held that a notice delayed *eleven days* was not immediate notice. In the Railway Passenger Association Company v. Burwell, 44 Ind. 460, it was held that a notice delayed *six days* was not "immediate" notice. In Harbour Commrs. v. The Guarantee Company of North America, 22 Canada Sup. Court, 542 (see note 19th C. C. A. 276), it was held that a delay of *a week* was not immediate notice. In the Queen v. The Justice of Berkshire, 4 Q. B. Div. 469, a delay of *four days* was held not to be immediate notice, the Court saying: "The words 'forthwith' and 'immediately' have the same meaning. They are stronger than the expression 'within a reasonable time,' and imply prompt, vigorous action, without any delay, and whether there has been such action is a question of fact having regard to the circumstances of the particular case."

In the case of Streeter v. Streeter, 43 Ill. 155, the court held that immediate notice had not the same meaning as the words "as soon as could practically be done." In our case the lower court in its charge to the jury told them that "immediate" notice meant "that it was the duty of the plaintiff in this case to give, as soon as was reasonably practicable, and with promptness notice of the discovery of any default;" that "immediate" notice meant "within a reasonable time." In this case there was no dispute as to the facts bearing on the question of the time of the Receiver's discovery of McKnight's defaults and the time he gave the notice. All the testimony on that subject was offered by the Receiver, and there was practically no conflict in the evidence as to this point. In May on Insurance, Section 462, quoted by the Circuit Court of Appeals, it is said:

> "Whether due diligence has been used in giving the notice is a question which is ordinarily left to the jury to be found from all the circumstances in the case. Where the facts and circumstances bearing upon the question of due diligence are not in dispute, it becomes a question of law for the Court."

In the Pauly cases there was a conflict of evidence as to when the Receiver got notice of a default; but it was certain that the Receiver gave *a notice in two or three days* after the Examiner reported that there was a default. In our case, the Receiver, as he admits, kept pace with the Examiner, who discovered defaults in two weeks after the Bank was closed. McKnight was arrested one day after the Bank was closed, and yet *the Receiver's short letter was not written to the surety until thirty days after McKnight's arrest, and thirty-one days after the Bank was closed*, and at least ten to seventeen days after the Examiner and Receiver had discovered at least some of the defaults set up in this action. Here there were not merely suspicions of fraud. The President was actually arrested for fraud the day after the Bank closed.

In the American Surety Company v. Pauly, 170 U. S. 160, it is said:

> "There was evidence tending to show that although the Receiver had reason, in the months of January, February,

> March, or April, 1892, to believe that there were *irregularities* on the part of Collins as President of the Bank, he did not become aware of any specific acts of *fraud* or dishonesty by him until the expert book-keeper employed to examine the bank's books informed him *a few days prior to May* 23, 1892 [the date of the notice], that he had discovered false entries showing fraud and dishonesty on the part both of Collins and O'Brien."

In the American Surety Co. v. Pauly, 170 U. S. 139, the suit on the bond of Cashier O'Brien, Justice Harlan said:

> "The Receiver was not aware of 'the amounts or specific conditions' of such irregularities, nor of any specific act of fraud or dishonesty upon the part of the cashier, until the expert book-keepers had completed their examination of the books of the Bank *about May* 23, 1892, *on which day* the Receiver wrote to the Surety Company, etc."

In another place (p. 139) Justice Harlan said:

> "*Towords the end of May* the experts made certain discoveries involving the fidelity and integrity of O'Brien as cashier, of which Bloodgood gave notice to the Receiver [May 23d]."

In other words, the Supreme Court thought that the receiver did not get notice of any default of the president or cashier until a few days before he sent the letter of May 23d, and that that was immediate notice, or at least that the jury might find such notice to be immediate. In the McKnight case the directors and the Cashier had known of the Edmunds and the Britt and Reeder defaults for more than a year; the Edmunds check for $1,000.00 of January 21, 1896, which was fraudulently carried as a cash item till March 12, 1896, and was never paid, and the Britt and Reeder note of February 6, 1896, for $2,000.00, which bore no interest and was never paid, were not forgotten by the officers and directors when McKnight was arrested; and both these transactions were matters which the Bank Examiner and the Receiver must have learned immediately when the bank closed and McKnight was under arrest for fraud, and they certainly knew of some one of these defaults at least two weeks before the letter was written, and

may have known of them four weeks before. It seems clear, therefore, that the court erred in allowing the Receiver in this case to offer his letter of February 18, 1897, as "immediate notice" under the contract. In some insurance cases the courts have been indulgent where ignorant or unbusiness-like people have been a little slow in sending a notice; but here we have an expert—a Receiver who understands the meaning of words and the need of speed and the danger of delay—and who waited unreasonably long before writing a short letter to the surety as a notice under the bond.

The Circuit Court of Appeals criticised the form of the exception taken to the admission of the letter of the Receiver of February 18, 1897, as an "immediate notice" and to the form of the exception to the charge; but the objection to that letter as an immediate notice was made (1) in the pleadings (2) when the evidence was offered (Rec. 33), and (3) when the charge (Rec. 49, 57) was given; and both the counsel for the Receiver and the Court understood the exception to be exactly what it was meant to be, and this is shown by the words of the Court in Instruction 2 (R. 57). Nobody was misled by the form of the exception, and it is sufficient.

SECOND POINT.

Petition in Courtney v. McKnight was competent evidence.

My *second point* is that the court erred in telling the jury, in Instruction No. 1 and in Instruction No. 3, that the petition in the case of Courtney v. McKnight in the Jefferson Circuit Court, filed March 6, 1897, on which an attachment was issued, should have no effect in their deliberations and was not competent evidence, because it did not "show any thing concerning the particulars of this debt," and did not show "that the plaintiff had known the particulars before this suit was filed" against the plaintiff in error. As appears in the resume of the facts, the petition referred to shows that, on March 6th, at least, and no doubt long prior thereto, the Receiver knew of *at least four* of the defaults of McKnight, aggregating $6,989.00. The first

paragraph of the petition sought to recover of McKnight $1,000.00 on the note executed by McKnight to the Bank March 19, 1895, and that is the tenth item in the account set up in this case (Rec. 5); and the third paragraph of the action in the State Court sought to recover of McKnight $2,253.00 with interest from January 21, 1896; that is the $1,000.00 gotten by Edmunds on January 21, 1896, and the $1,253.00 paid to Messrs. Sachs for McKnight's indebtedness on the same day. The fourth paragraph sought to recover the $3,736.00 which on June 8, 1896, was paid by McKnight to Embry by means of a check drawn on the German National Bank in favor of the Union National Bank. These four items amounted to $6,989.00, and these four defaults were known with all their particulars on March 6, 1897, as appears from that petition in Courtney v. McKnight. The lower court, in Instructions No. 1 and No. 3 (Rec. 56 and 57), erred in telling the jury that said petition showed only that the Receiver knew of one of these defaults, namely, the check for $3,736.00 given to pay the Embry debt. The court (Rec. 56) said:

"Before, however, going into that I should have said, if I have not, that the action that was brought in the Jefferson Circuit Court, some time in March, 1897, for the recovery of certain debts, should have no effect in your deliberations in this case. That was a suit, not upon this indebtedness except in respect to one particular item, that of $3,736.00, but was a suit upon other indebtedness. It is a suit in several paragraphs, one of which is upon notes and obligations executed by McKnight to the Bank, but the only one of the items mentioned in that suit that is contained in the suit in the State Court is that of $3,736.00, which represents money that had been paid through the Union National Bank upon the debt of one Embry. I need not go into any reasons with you upon the subject, but the court is clearly of the opinion that no importance should be attached to that suit or any of its affirmations in your deliberations in this case . . ." Counsel for defendant objected and excepted to the foregoing portion of the charge. Three of the items set out in said action are now embraced in this action on said bond; and the plaintiff's notice thereof to defendant and the demand upon defendant therefor were delayed too long."

In the Third Instruction (Rec. 57) the court said:

"One of the most important reasons why this suit, that was filed in the State Court, was not regarded as important evidence in this, was that it does not show anything concerning the particulars of this debt, nor does it show that the plaintiff had known the particulars before this suit was filed."

This language of the court evidently led the jury to believe that they must pay no attention whatever to that suit in determining whether or not the Receiver filed with the surety his CLAIM "with full particulars thereof as soon as practicable thereafter." The court was led into this error by overlooking the fact that in the third paragraph of that petition the Edmunds check for $1,000.00 was combined with the check to Messrs. Sachs for $1,253.00. Many of the items of default set up in this suit against the surety were abandoned, but of those on which the surety was finally held liable for $10,000.00, three amount to $5,989.00. The effort in this suit to recover $1,000.00 on that note of March 19, 1895, was abandoned shortly before the trial began. These facts show that the petition in the action in the State Court was competent and important evidence bearing upon the question whether the Receiver, after he had information and particulars definite enough for an action and attachment in the State Court for $6,989.00, had a right to delay for *nearly four months* a claim for $10,000.00, the amount of the bond, for under the contract, he was bound to file it with the Company "as soon as practicable."

THIRD POINT.

The Claim Made July 2, 1897, was Too Late, and Instruction 3 (Rec. 57) was Wrong.

My *third point* is that the Bank, after it knew of the Edmunds check, and certainly after it knew of the Britt and Reeder note, in January and February, 1896, ought to have made a demand upon the Surety in 1896, but that, at any rate, the Receiver should have made his demand long before July 2, 1897. As the counsel for the Receiver has contended that this claim is in time, if filed in six months, it is important to analyze the language of the bond.

The contract (Rec. 29 and 32) provides that the Bank shall recover for a default only upon the three following conditions:

(*a*) "That the employer shall immediately give the company (surety) notice in writing of the discovery of *any* default [a single default] or loss hereunder;
(*b*) and shall file with the company his or their claim hereunder, with full particulars thereof, as soon as practicable thereafter;
(*c*) and no claim which shall not be so filed by the employer with the company within six months after the expiration or cancellation of this bond, or within six months after the employe shall have ceased to be in the employer's services, shall be payable hereunder."

The proviso "C" clearly does not mean that the employer may delay six months to file his claim under "B" if it is practicable to file said claim sooner with full particulars thereof. The proviso "C" merely means that after the bond has expired or has been cancelled more than six months, or after the employe has ceased for more than six months to be in the employer's service, there shall be no right to recover on the bond, notwithstanding a claim may have been filed as soon as practicable after the ground for it has been discovered. In other words, employers must discover defaults at all events within six months after the bond expires or the employe leaves the service, but they still can not recover unless (*a*) they give immediate notice and (*b*) file their claim as soon as practicable thereafter, with full particulars,

etc. *It was not proper for the Bank or the Receiver to wait six months or until all was known of McKnight's defaults to file that claim.* The lower court in the case of the American Surety Co. v. Pauly, in the suit on the bond of O'Brien, the cashier, as appears in 170 U. S., page 146, said that the defaults of O'Brien and Collins were not discovered until some time after May 1, 1892, although there had been suspicions before that date; that the first notice was sent on May 23, 1892, and that the formal demand or claim was made on June 24, 1892, and the Court also said:

"Now I charge you as a matter of law, that, if the facts were as they were assumed to be at the outset of the trial—that is, that the discovery was made early in February, and notice was not given until July—that was not notice with reasonable promptness. And I do not know but that I could charge you, as a matter of law, that, if the facts were discovered in the early part of February, and notice was not given until the latter part of May, that was not notice given with reasonable promptness. But, *if you come to the conclusion that the discovery was not made until the latter part of May*, then, in view of the situation of the plaintiff, you may reasonably come to the conclusion that it exercised proper diligence in sending the notice."

The Supreme Court said this instruction was correct. In the Pauly case *the claim was made by the Receiver about thirty days after the notice of May* 23, 1892, and that delay of *one month* was held not to be too long. But in the McKnight case the claim was not made from February 18, 1897, when the letter was written by the Receiver, until July 2, 1817, about *four months and a half*. On March 6, 1897, as we have shown, the Receiver knew of four items of McKnight's defaults, amounting to $6,989.00, and yet the Receiver made no claim or demand for nearly four months after that date. This was certainly not complying with the agreement of the Bank that it would "file with the Company his or their claim thereunder with full particulars thereof as soon as practicable thereafter." The Receiver said (Rec. 34): "At the time we gave that notice (letter of February 18, 1897) we had examined far enough to know he (McKnight) was *in default far beyond the amount of the bond.*" If so, the

claim should have been made then, not four months and a half later. We were interested only to "the amount of the bond," and we were entitled to a claim for that amount "as soon as practicable" for we, like the Receiver, might have wished (after we paid the claim) to take an attachment against McKnight's property.

The giving of the notice by letter on Feb. 18, 1897, even if it were such an immediate "notice" as the contract required, did not abrogate or dispense with the other right which the Surety Company had by its contract, namely, the right to have delivered to it the Receiver's demand or "CLAIM hereunder with full particulars thereof as soon as practicable thereafter." The Court can not say, as a matter of law, where the Surety Campany and the Bank have by contract given the Surety Campany (1) a right to an immediate notice, and (2) a right to a claim or demand with full particulars, as soon as practicable, that the Surety Company can be deprived of one of its rights so agreed upon. This Court can not say, as a matter of law, that after the Surety Company got that informal and indefinite letter from the Receiver about McKnight's defaults, it could no longer insist upon its right to have a CLAIM with full particulars *as soon as practicable.* This Court might think that such a claim with full particulars was of no special benefit to the Surety Company, but that was not the opinion of the Surety Company and the Bank when the contract was made. The Surety Company would not have required the Bank to file with it a claim with full particulars of defaults as soon as practicable, if the Surety Company and the Bank had not understood that such a right was valuable to the Surety Company; but whether such a right was of any practical value to the Surety Company or not, it is entitled to enforce its contract as to this matter. The Receiver did not deny the right of the Surety Company to have such "a CLAIM with full particulars as soon as practicable;" and hence, this Court, it seems to me, ought to say as a matter of law that more than four months' delay after the sending of the letter of February 18, 1897, and nearly four months after the filing of that suit by the Receiver against McKnight with a prayer for attachment against his property, was not a compliance with the agreement or contract to file the claim

with full particulars as soon as practicable. The letter of February 18, 1897, gave the Surety Company no definite information on which it could take legal proceedings to protect itself against loss by reason of McKnight's defaults. For the protection of the surety it was necessary that it should have, as soon as practicable, a claim with full particulars of his defaults so that it could, if necessary or useful, proceed at law against McKnight's property. The claim in this case was for $18,742.74, and that was the amount sued for in this action, and yet, on the trial, the Receiver abandoned more than one third of that claim; and besides, nearly seventy-five per cent of the sums which the Receiver sought before the jury to hold us for appeared in that petition of Courtney v. McKnight, on March 6, 1897. After the Receiver wrote us that vague and indefinite letter of February 18, 1897, from which it did not appear whether McKnight's defaults would be very small or very large, he took an attachment on March 6, 1897, against McKnight's property on account of some defaults in which we were not interested, as well as some in which we were interested, and after having thus sought to hold McKnight's property, not for our benefit, the Receiver held back from us, for four months, the only information on which we could have acted in an effort by suit or otherwise to protect ourselves against McKnight's defaults. The Receiver had no right to hold us back in this way while he was seeking to cover McKnight's property by an attachment lien which would not have protected us entirely, and which might have deprived us of the only property to which we could have resorted for securing our claim. We could not pay the Receiver until the regular claim was presented to us and we could not safely sue McKnight until we had paid the claim and thus had become his creditor. Promptness by the Bank or Receiver in presenting the claim was vital to our interest. As the principal prejudiced the surety by delay, the surety, under its contract, is released. This claim was not made until about five months and a half after the Bank was closed and McKnight arrested, about four months and a half after the vague notice in the letter of February 18, 1897, was sent, and nearly four months after the Receiver, on March 6,

1897, had sued McKnight and attached his property. No reason or excuse is given for the delay.

FOURTH POINT.

A Cashier's reply in due course of mail to a letter of inquiry addressed by a surety to the Bank itself is admissible as evidence against the Bank without preliminary proof by the surety that the Board of Directors gave formal or special authority to the Cashier to write that particular letter; but the contrary principle has been established in this case by a majority of the court below in misapprehension of the meaning of the Pauly case.

The surety, on May 15, 1896 (Rec. 43), wrote a letter, not to the Cashier, but to the German National Bank, and asked the Bank to certify whether or not McKnight's books and accounts were correct, and whether all moneys handled by him had been accounted for. A proper reply to that letter was a condition precedent to the renewal of the bond, as the Cashier and Bank knew. The Cashier, in due course of mail, returned the certificate on May 29, 1896, and said: "He has performed his duties in an acceptable and satisfactory manner, and we know of no reason why the guarantee bond should not be continued." This letter was written by a Cashier who personally knew all the evidence of McKnight's guilt, as shown in the resume of facts. The agent knew that he could not get the bond without that statement; and he knew that the statement was false.

The court below refused to allow that letter or certificate of the Cashier to be read to the jury, because the surety was not able to prove that there had been a formal vote by the Board of Directors authorizing him to write such a letter. The Bill of Exceptions (Rec. 44) says: "And it not appearing that there had been *special authority* from the Board of Directors of the said Bank, authorizing or directing the said Cashier to write such communication, and the court being of the opinion that the Cashier had no such power by reason of his office, the same was

not binding upon the said Bank, and excluded the same as evidence."

It can not be disputed that a surety is entitled to an honest and candid answer from the employer when inquiry is made; and, when the answer is returned in due course, and by one apparently authorized to answer, the surety should be able to rely upon the answer; but the court below held that the answer of a cashier to a surety, in due course, can not be proven unless proof is made that by formal action of the board itself he was authorized to write that particular letter. Such proof would generally be impossible. This decision was based upon the language used in the American Surety Company v. Pauly, and yet we respectfully submit that the decision in that case will not bear such a construction.

In the *first* place, we sought to show by the Cashier himself that his own bond was paid for by the Bank and that this McKnight bond was not obtained by McKnight for his own benefit, but that the Bank itself (R. 54) selected the surety of the President and the Cashier and paid for the bonds, and was interested in getting the bonds executed and in having them renewed, and that "all these bond matters were discussed by the Board of Directors," and that the Cashier when he was replying to the letter of the surety to the bank "knew the bond had to be renewed, and * * * wrote the letter to the Company on that account," and thus obtained for the Bank the bond which it accepted on these terms and on which it now sues while attempting to repudiate and disown the means by which it was obtained by its agent; but the lower court would not allow us to prove these facts. In the *second* place, because the Supreme Court in the Pauly case said that a president in a mere letter of recommendation for the cashier when he was first applying for a bond, when there was no contract to the effect that the president's statement should be the basis of the bond, and when there was collusion between the president and the cashier to defraud the bank, could not bind the bank by his statement, the Circuit Court

in this case—in which the contract and the facts are entirely different—has held that a cashier, when the bank desired a renewal of the President's bond, could not answer an inquiry by a surety in due course of business and state as a fact how the President had performed his duties unless the cashier had been first authorized to answer by a formal resolution of the Board of Directors.

A contract made by a bank with a surety is like any other contract made by a bank, and a letter written by a cashier on that business is like any other letter written by him on the business of the bank. If the Courts attempt to draw distinctions between the various contracts made by a bank and between the multitudinous letters which a cashier must write in the ordinary course of business, and to say that, as to certain contracts, he can speak for the bank in its correspondence without formal proof of his authority, but, as to other contracts, he can not write without a special authority from the board, and that when he has written a letter it can not be proven till formal proof is made of his authority to write that particular letter, the Court will get into endless difficulties, and the public will never be able to rely upon the letters or assurances of the only officer who is, by usage and by law, authorized generally to act and to write for the bank. The decision in this case in not a logical corollary of the Pauly case, and is in conflict with the text-books and decisions which have long settled the law as to the inherent powers of a cashier. Not only will this decision unsettle the law, but it will make the transaction of business with a bank troublesome and unsafe. One of the judges of the Circuit Court of Appeals did not approve this departure from a well-settled rule.

There is a wide difference between the duties and powers of a President and a Cashier. The Cashier is the chief executive officer of the bank. To him is entrusted the duty of conducting the correspondence of the bank. Persons who receive letters from him about the contracts of the bank can not require, as proof of his authority, a certificate of the board that he has been authorized to act. That would stop the business of a bank. If he said in his letter that he had been authorized to act, outsiders

would still not know whether his statement was true. To write at all is a tacit assurance that he has been authorized to write. When inquiries are addressed to the bank (as in our case), his answer must be presumed to be authorized, at least until the contrary is shown. To require proof of his authority in each case, or in ordinary cases, would be unreasonable and clog business, and would prepare endless traps for honest but unwary men. If the law were so unreasonable, a bank could often get an advantage of others by simply taking no formal action that could be proved, and by giving to the Cashier no special authority that could be established by evidence in court. While he was entrapping unsuspecting parties dealing with him in good faith on the assumption that he was authorized to do what he held himself out as able to do, the Board could sit still complacently and having eyes see not, and having ears hear not; but in the end could keep the benefit while repudiating the corrupt means by which it was attained.

In this very case the Bank, as well as McKnight, wanted his bond renewed. It could not get the bond renewed without a statement by its cashier to the effect that McKnight's accounts and moneys were correct, and that he had performed his duties in an acceptable and satisfactory manner, and that no reason was known why the guarantee bond should not be continued. The letter was addresed to the Bank; the Cashier responded and made the statement necessary to enable the Bank to get what it wanted. It got the benefit of the Cashier's letter, and is now contending that he had no authority to write the letter. The Bank was paying for the bond. That is the custom now with the banks. The Vice-President (R. 33), on behalf of the Bank, was taking an interest in getting a renewal in 1895, and the Cashier was doing this for the Bank in 1896. It is admitted that we were deceived by the letter of the Cashier; that but for that fraud we would not have executed the bond. In conscience and in law the Bank can not hold the advantage while repudiating the false statement made by the only agent that could conduct its correspondence.

In Thompson's Commentaries on the Law of Corporations, Sec. 4783, it is said:

> "The settled law that a principal is answerable where he has received a benefit from the fraud of his agent, acting within the scope of his authority, seems equally applicable to corporations and individuals. But where the agent has made the false representation in the line of his duty, and under circumstances which authorized the party seeking the information to regard it as the information of the corporation, it is quite unnecessary to the liability of the corporation that it should have received any benefit from it."

The renewal of this bond was the business of the bank; as much so as any other business it had. This answer of the cashier to our inquiry was made in the regular course of business, and came strictly "within the customary or ordinary duties of a cashier." He was not acting "outside of his ordinary duties." On the contrary, he was acting "within the scope of his agency." We have shown that there was no collusion between the Cashier and the President, and that the Cashier informed his father, the Vice-President and director, of every thing that went on at the Bank, and that the father, during 1896, was not friendly to McKnight. As the Bank ratified the act of the Cashier in writing that letter for the purpose of continuing the bond from June 1, 1896, to June 1, 1897, and as we renewed the bond on the faith of his letter of May 29, 1896, and as we would not have renewed the bond but for that letter, the Bank can not hold the benefit of the renewal bond without ratifying and approving the act of the Cashier in writing the letter.

In Morse on Banks and Banking, Sec. 162, it is said that "the Cashier has charge of the correspondence of the bank," and that "letters on corporate business are properly addressed to him, and whatever statements or information are contained in them will, in law, affect the bank with notice." See Sec. 165 (*b*); Section 171 (*d*). In Section 98 (*c*) the same author says that "whether at common law or under such statutory enactments, they (the directors) seek to curtail the ordinary powers of any of their officers, their action in so doing can only be valid as between the officer and the bank."

In Sec. 166 it is said:

> "Notice to the cashier that stock pledged is trust property is notice to the bank. . . . Sec. 152. The cashier is the chief executive officer through whom the whole financial operations of the bank are conducted. . . . The keynote to the whole subject lies in this: That the office of the cashier is strictly executive. . . . He is properly the executive agent of the directors. . . . Sec. 153. There are certain functions which by long and univer-al usage have come to be recognized as belonging to the office of cashier, and have been judicially ascertained and declared to be inherent in the cashier as matter of law, and without any vote of the directors or provision of the organic law."

Thompson on Corporations, Sec. 4740:

> "He (the cashier) is a statutory officer, not of the directory, but of the corporation. . . . Though chosen by the directors, he is as much the statutory agent of the corporation as the directors themselves."

In Boone on the Law of Banking, Sec. 115, it is said: "The cashier is also the agent of the bank for the purpose of writing and receiving letters on the subject of its ordinary business. A letter from him on the business of his bank is a letter from his bank, and a letter to him relating to the business of his bank is a letter to this bank; and the bank is chargeable with knowledge of the contents of such letter.

In Thomas v. Wells, 140 Mass. 517, it was held that where a letter was written to a firm and it was answered on the letterhead of the firm by an agent who ordinarily did not conduct the correspondence of the firm, the letter was nevertheless admissible against the firm, the Court saying:

> "It was written upon the business paper of defendant's firm, and was in answer to a letter sent two days before by the plaintiffs to the defendants, to which plaintiff required an answer and to which no other answer was returned. Upon this evidence it was not a violent inference for the jury to draw that the plaintiff's letter had been handed for an answer to Wells, the salesman who had made the contract with the plaintiff and knew what its terms were."

See Morse v. Conn. River R. Co., 6 Gray, 450; McGenness v. Adriatic Mills, 116 Mass. 177.

In McGee v. The Manhattan Life Insurance Company, 92 U. S., page 93, the Supreme Court held that, though a surety might not be released where he did not ask for information, he would be released when he asked for information and was not given a true answer, the Court saying: "If the surety desires information, he must ask it. . . . If the creditor be applied to, he must make a full and frank communication." (See Brandt on Suretyship and Guar. (Ed. 1891), Secs. 421, 422, 423.)

In Merchants Bank v. The State Bank, 10 Wallace, 604, it was held:

> "Where a party deals with a corporation in good faith—the transaction is not *ultra vires*—and he is unaware of any defect of authority or other irregularity on the part of those acting for the corporation, and there is nothing to excite suspicion of such defect or irregularity, the corporation is bound by the contract, although such defect or irregularity in fact exists."

In Xenia Bank v. Stewart, 114 U. S. 224, the Court said:

> "The letter was written on the paper of the Bank and by the person shown to be its cashier, and it appears with reasonable certainty to have referred to the business of the Bank. The Court was, therefore, right in not excluding it from the jury."

See Case v. The Bank, 100 U. S. 446–454; Martin v. Webb, 110 U S. 7; Badger v. Bank of Cumberland, 26 Maine, 428; Coldwell v. National Mohawk Bank, 64 Barbour, 333; Birmingham Trust & S. Co. v. Louisville Bank, 20 Law Rep. Ann. 600.

Morse on Banks and Banking, Section 103, says:

> "Where the officer of the Bank knows that his answer to the inquiry (for information) is to form the ground of future action on the part of the inquirer, so that accurate information is not merely desired to satisfy a curiosity as to an occurrence wholly in the past, but is sought and needed for governing important dealings in the present and future—there the Bank is bound."

In the Pauly case, Justice Harlan, in the opinion, cites the case of Bennett v. Judson, 21 N. Y. 238, as follows:

"In Bennett v. Judson, which was the case of an agent of the vendor of land who made material misrepresentations as to its location and qualities, assuming to have knowledge of the facts, but without express authority from his principal, the Court said: 'There is no evidence that the defendant authorized or knew of the alleged fraud committed by his agent Davis in negotiating the exchange of land. Nevertheless, he can not enjoy the fruits of the bargain without adopting all of the instrumentalities employed by the agent in bringing it to a consummation. If an agent defraud the person with whom he is dealing, the principal, not having authorized or participated in the wrong, may, no doubt, rescind, when he discovers the fraud, on the terms of making complete restitution; but so long as he retains the benefit of the dealing he can not claim immunity on the ground that the fraud was committed by his agent and not by himself. This is elementary doctrine, and it disposes of one of the questions raised at the trial.'"

As the lower court in the McKnight case excluded this letter of Cashier Reutlinger to the surety, and as a majority of the Judges of the Circuit Court of Appeals approved this action solely because they thought they were constrained to do so by the ruling in the American Surety Company v. Pauly, it may be well to note the marked difference between that case and this. In the suit on the O'Brien bond, it appeared that President Collins simply gave a certificate of good character to O'Brien when the latter was first applying for a bond. That was merely the answer of an individual to whom, as a friend of O'Brien an inquiry had been addressed; that was no part of the business of the President of the Bank. It is not the business of a President to conduct the correspondence of the Bank, and the letter of inquiry was not addressed to the Bank. In the McKnight case the letter was addressed to the Bank itself, and it called, not for a letter of recommendation, but for a frank, fair statement as to certain facts known to the Bank or its Cashier. That letter of the surety could be answered only by the Cashier. McKnight himself could not answer it, and the Board of Directors could speak only through the Cashier; and, as we have shown, by law and by custom, the cashier is the proper one to answer all correspondence. In the O'Brien case it was a question

merely of character; and the surety and the Bank had had no dealings together before. In the McKnight case there was no longer any mere question of character, but a question of fact, namely, whether McKnight had performed his duties during the past year in an honest and satisfactory manner. That was a matter that concerned the Bank itself, and about which there could be no doubt, and as to which the surety was entitled to a frank and correct answer. In the opinion in the Pauly case Justice Harlan lays stress upon the fact that President Collins' answers were merely commendations of a man who had not yet given a bond to the Bank with that surety, the Court saying: "No relations existed between the Bank and the Surety Company until O'Brien presented to the former the bond in suit."

Moreover, in the Pauly case the bond or contract did not provide that "the statement" of the president, on which the bond was obtained, was and should be held to be the basis of the bond. In the McKnight bond it was provided thus: "And, whereas, the said employer has delivered to the Company a certain statement, and it being agreed and understood that such statement constitutes an essential part of the contract hereinafter expressed." Further, the renewal contracts, by their terms, were "subject to all the covenants and conditions set forth and expressed in the bond of this Company No. 5002, heretofore issued on the first day of June, 1894." The renewal contract of June 1, 1896, on which we have been held liable for these defaults, was executed on the faith of the Cashier's excluded letter of May 15, 1896. That letter was "the statement" which "constitutes an essential part of the contract" on which we are held bound. By our contract we had a right to rely, not merely on "the statement" given us when the original bond was execu ed, June 1, 1894, but we also had a right to rely on "the statement" of the Cashier by which each renewal was obtained, for each renewal contract was, by its terms, "subject to all covenants and conditions set forth or expressed in the bond," etc.

In the Guarantee Co. v. Mechanics Savings Bank the teller's

bond as to this matter was word for word the same as our bond. The Guarantee Company's renewals were made in exactly the same way and on exactly the same terms as ours. In both cases the renewals were obtained on a certificate or statement of the Cashier in almost exactly the same words, as appears from this Court's opinion and the statement of the case. In the Guarantee case it is said:

> "This bond was renewed each year up to January, 1893, and in each year, before the bond was renewed, the Company furnished the bank with a blank form to be filled out, and stating: 'It is necessary before the bond can be renewed that you obtain the certificate on the back hereof by your president or cashier, and on its return, with remittance of the premium, the renewal can be effected.' The certificate on the back was filled up and signed BY THE CASHIER, and, among other things, stated that the accounts of said teller, Schardt, had been examined and verified by the finance committee of said bank; and the bond was not renewed in any year until this certificate had been made out and delivered to the Company."

That describes exactly what was done in our case except that the language of the Cashier's certificate in our case was stronger. This Court did not seem to have the slightest doubt that the cashier's certificate bound the bank in the Schardt case, and the Cashier's certificate in the McKnight case also should bind the Bank. As one of the judges of the Circuit Court of Appeals believed, a fatal error was made in excluding that letter or certificate of the Cashier. The true meaning of the Pauly case, which was based on its own peculiar facts, should now be made clear. In that case the statement of the president was the statement of a mere individual, and did not bind the bank because of his lack of authority, and because it was not agreed in the bond that "the statement" should be the basis of the bond, nor was said statement referred to and adopted in the bond.

FIFTH POINT.

The knowledge of Vice-President Reutlinger and Cashier Reutlinger of McKnight's defaults bound the Bank, but we understand the decision of the lower court not only to nullify the rule that the knowledge of such officers acquired in due course of business is the knowledge of the Bank, but also to be in direct conflict with the case of the Guarantee Company of North America v. the Mechanics Savings Bank and Trust Company decided by this Court January 6, 1902.

In this case the Vice-President, who was also a director, was not a mere figurehead. He was paid a salary of $1,500.00 per year (R. 38) for constant attendance in the Bank with active duties to perform. His desk was in the Bank (R. 40), where he could see and hear all important transactions. "He frequently examined the books of the Bank and kept the run of the Bank and what notes were discounted by the Bank and what overdrafts existed." "He sometimes acted as cashier and teller for his son." He was "familiar with the management of the German National Bank during all the time Mr. McKnight was there." He was (R. 38) "custodian of the Bank's cash reserve of many thousands of dollars." "It was the custom of the Cashier (R. 38) to tell his father, the Vice-President, all that went on at the Bank, etc." There was no collusion between the Vice-President or Cashier and McKnight, because "the feeling between Adolph Reutlinger, the Vice-President, and McKnight (R. 38) was not friendly during the year 1896." On March 11, 1895, he wrote a letter to the Fidelity & Deposit Company about McKnight's bond (R. 33), but this letter was excluded by the court from the jury. Evidently this was an active officer of the Bank.

The circumstantial evidence already set out shows that the Vice-President knew all about the Edmunds check for $1,000.00 and the Britt and Reeder loan of $2,000.00 except as to the exact contents of the two corrupt pledges and the names signed to them. He certainly knew there was gross fraud, if not political corruption,

in these deals; and that was enough for him to know. As the Bill of Exception shows (R. 37), he often had conversations with Edmunds, the political boss, during the heat of the canvass, at the Bank, which was evidently the political headquarters, and "*knew the purposes of his visits.*" As to the Britt and Reeder loan, he knew all that any man of sense needed to know to understand that a fraudulent political deal was being carried out with $2,000.00 of the Bank's money. The knowledge of an active Vice-President, who was a director, when the President was perpetrating frauds and when there was no collusion, ought to be considered the knowledge of the Bank when outsiders are concerned; and all the authorities cited and the reasoning applied in the American Surety Company v. Pauly are consonant with that principle.

The proof of the Cashier's guilty knowledge is equally complete; but we understand, and we believe the jury understood, the Court's instructions to say in substance:

(1) That the Cashier did not have knowledge of any fraud or default;

(2) That if he did have such knowledge, he did not get it in due course of business (though all he learned was learned while he was at work on the Bank's business in the Bank itself);

(3) That if he did have such knowledge, it made no difference in law, because his knowledge is not the Bank's knowledge.

The circuit court told the jury in substance that notice to the Cashier of McKnight's defaults was not notice to the Bank, and yet when we, in complaining of this erroneous charge, say that the Cashier did have such notice, and that the jury, if correctly instructed, would have so found, we are answered by the Circuit Court of Appeals with the statement that the jury found by their verdict that there was no notice. The Fifth Instruction of the Court (R. 59, 60), in effect told the jury that if the Bank (as distinguished from its cashier or any directors) knew of the defaults of McKnight and agreed to them, or if the Bank (mean-

ing its Board of Directors) knew of his defaults and condoned them, the Surety would be released; but the Court told the jury that McKnight's almost daily overdrafts did not of themselves constitute defaults, the condoning of which would release the Surety. The Court also said:

"Now, I suppose in this case, if *the Bank* had known that McKnight was making these drafts for these various fraudulent purposes, such as buying up Councilmen, buying up Aldermen, paying his own private personal debts; if *the Bank* had known that and consented to it, there would not have been a fraudulent act by McKnight for which the Bank could recover against this Company. But if you believe from the evidence that *the Bank* did not know of the fraudulent purposes for which these overdrafts were made, if the overdrafts were made in connection with this matter—if you believe *the Bank* did not know the fraudulent purposes, then that changes the result; because if the Bank did not know and still consented to it, it would not relieve the act of McKnight from the character of being a fraudulent act. So that, as I view this case—you must remember, however, that you are the sole judges of the evidence in this case, its credibility—as I view this case, however, there would be no fraudulent acts upon McKnight's part, limiting my observations now to the overdrafts, there would be no fraudulent act upon his part merely in an overdraft, if there were no fraudulent intent behind it, which was concealed from the Bank." . . . The defendant excepted because "The foregoing instructions did not submit correctly to the jury consideration of knowledge on the part of the officers or directors of the Bank, other than McKnight, which they had or would have had if customary supervision had been exercised."

In the foregoing charge the Court, by the constant repetition of the words "the Bank," evidently meant to tell the jury, and the jury understood the Court to mean, that no notice could be imputed to the Bank which was not made directly to the Board of Directors in their meetings. The Court might not have intended to go quite so far, but the jury must have thought, from the language of the Court, that neither the knowledge of the Cashier, nor the knowledge of the Vice-President, nor the knowledge of any or all of the directors individually, outside of the meetings of the Board, would release the Surety. The Court

also, in that language, in effect, told the jury that, if the Board of Directors, as a board, knew of McKnight's defaults and agreed to them, they were not defaults, and, therefore, we could not be bound; that, if the Board of Directors did not know of the defaults, then we were bound. In other words, the jury must have understood that we were bound, unless the Board of Directors had a formal notice of McKnight's actions and condoned them.

The sixth instruction of the Court brings out more sharply the Court's intention to tell the jury that the knowledge of a cashier gotten in the course of business in the bank is not the knowledge of the bank.

The Court said:

> "I do not think that the knowledge of a cashier of a bank, speaking generally, if [is] the knowledge of the bank as to any matter that does not come within the customary or ordinary duties of a cashier or those which have been specially imposed upon him by the action of the bank. I do not think Mr. R. E. Reutlinger in this case, in respect to any matter which he knew or could do, represented the bank, if it was outside of his ordinary duties; and I do not recall any thing that he knew, so far as the proof shows, that would in any wise affect the liability of the defendant in this case.
>
> "The defendant objected to the foregoing portion of the charge on the ground that the knowledge of the cashier of the acts of McKnight in respect to his overdrafts and his transactions with Britt and Reeder, and with Edmunds and Sachs, etc, was the knowledge of the bank."

The sixth instruction practically told the jury that all the cashier knew about McKnight's giving Edmunds those ten one-hundred-dollar bills during the Mayor's race before the General Council, and about McKnight's keeping the Bank open until six o'clock to give Britt and Reeder $2,000.00 of the Bank's money without interest for one year and without security, and about his paying Sachs for his private indebtedness with the Bank's money, and about the innumerable and large overdrafts, was information gotten by the cashier outside of the performance of his duty as a

cashier; that such knowledge of the cashier did not "come within the customary and ordinary duties of a cashier or those which have been especially imposed upon him by the action of the Bank"—that what the cashier learned about those transactions of McKnight's "was outside of his ordinary duties." And yet the cashier learned nothing, so far as the proof showed, outside of the Bank or when not discharging the duties of his office. *Every thing he learned about McKnight, so far as the proof shows, was learned by the cashier in the discharge of his duties—in the ordinary and customary discharge of his duties.* The cashier did not learn of these matters about McKnight merely from rumors or gossip on the street or in some other corporation in which they were directors or officers. On the contrary, the cashier learned of all these defaults of McKnight while he, the cashier, was paying money of the bank, as cashier and teller, to Edmunds; while he, as cashier, was keeping the bank open until six o'clock to give the money of the bank without security and without interest to Britt and Reeder; while he, as cashier, was paying the checks of McKnight that were creating those daily and large overdrafts; while he was holding up in his drawer, as cash items, for several weeks—almost for two months—checks of McKnight that could not be paid because McKnight had no money in the bank, and which should not have been held up as cash at all. The cashier knew that McKnight had no right to ask such favors, and that he, the cashier, as Judge Story said in Minor v. Mechanics Bank of Alexandria, 1 Peters, 46, had no right to grant them. In this case, we have not been able to prove any knowledge of the cashier which was not gotten in the bank itself, while he was discharging his duties.

We feel sure that the jury believed that the cashier knew very well at the time that the $1,000.00 given to Edmunds, the political henchman of McKnight in the race before the Council, in ten one-hundred-dollar bills which the cashier had to get from another bank was to be used in that race. The race was a matter of general notoriety, as appears from the bill of exception

Every intelligent man in the city of Louisville knew of it because the papers were full of it, and the proof shows that the cashier and his father knew why Edmunds was coming to the Bank, and why the other political workers of McKnight were coming there during that heated controversy. The jury must have believed also that the cashier knew well what the Britt and Reeder transaction meant. If he had not understood it well, he would not have run to his father's house at nine o'clock in the evening to tell it to his father, who was not friendly to McKnight. It is impossible to think that a cashier would believe the Britt and Reeder transaction was an ordinary bank transaction, the Bank being kept open until six o'clock to carry it out, and $2,000.00 of the Bank's money being lent for a year without interest and without discount and without security to two politicians of the General Council before which McKnight had been a candidate a few weeks earlier, and with whom and "the gang" he was still having meetings in the Bank building. It will be remembered that McKnight, when he asked the cashier to remain, told him that "he had a big scheme on hand," and next morning McKnight told the Vice-President in the Bank, when he showed the yellow envelope, that "those fellows had signed a paper," and that "he would not have signed it for the city of Louisville." The son had told the father the evening before who "those fellows" were and how they had gotten $2,000.00 before signing that corrupt paper. Director Reisch says he knew all about it three days later; that the Vice-President told him.

Whatever the jury might have believed on these subjects—though they might have been morally certain that the cashier knew all about these corrupt transactions—still they must have thought from the instructions of the Court that the knowledge of the cashier of these defaults and this corruption could not excuse the Surety under the instructions of the Court. Indeed, it is *impossible* that the jury could have otherwise understood the charge of the Judge, because he distinctly told them: "I do not recall *anything* that he knew, so far as the proof shows, *that would*

in anywise affect the liability of the defendant in this case." The jury hung a long time, and they were not brought to agreement on a verdict until after the Court gave them an additional, and, as we believe, a misleading instruction, No. 8.

It becomes highly important, therefore, to determine whether the knowledge of a cashier, gotten while he is transacting the business of the bank in the bank, is the knowledge of the bank. The quotations from Mechem, Story, Morse, Boone, and Thompson show that the text-writers approve the principle for which we contend, and the decisions of the courts, with few exceptions, are in the same line.

The National Banking Act (Section 5136, Sub-section 7) authorizes a National Bank to exercise its powers "by its board of directors, or duly authorized officers or agents." As said in Boone on the Law of Banking, Section 103, "the cashier of an incorporated bank is the general executive officer to manage its affairs in all things not peculiarly committed to the directors, and he is *the agent of the corporation, and not of the directors.* As such executive officer he transacts most of the business of the bank. He is held out to the world by the bank as its general agent for the transaction of its affairs, within the scope of the general usage, practice and course of business of banking institutions; and his acts within such scope of authority will in general bind the bank in favor of third persons possessing no other knowledge. *The directors may limit his authority as they deem proper, but this would not affect those to whom the limitation was unknown."*

For many purposes the cashier, as much as the board of directors, is the agent of the bank.

In Thompson's Com. on the Law of Corporations, Section 4740, it is said:

> "A cashier of an incorporated bank is regarded in law as its general executive officer. He is in no sense the agent of the Board of Directors. He is a statutory officer, not of the directory but of the corporation. . . . Though chosen by the directors, he is as much the statutory agent of the corporation as the directors themselves."

In Mechem on Agency, Section 718 (Ed. 1888), it is said that a notice to, or the knowledge of, an agent like a cashier, is the knowledge of the corporation, except (1) when it is the duty of the agent (like a lawyer or a priest) not to disclose what he knows, or (2) when the agent is really acting in his own interest or in another's interest, and adversely to the principal, and where there is collusion, and (3) when the person claiming the benefit of the notice was in collusion with the agent to cheat or defraud his principal. None of those exceptions apply in this case.

See Story on Agency, Section 140 (*b*), Thompson on Corporations, Section 5224; Morse on Banks and Banking, Section 152-3, 166, Section 153 of which says:

> "There are certain functions which, by long and universal usage, have come to be recognized as belonging to the office of the cashier, and have been judicially ascertained and declared to be inherent in the cashier as matter of law and without any vote of the directors or provision of the organic law."

In the Distilled Spirits, 11 Wallace, 356, the Supreme Court held that the knowledge of an agent who bought the distilled spirits that they had been removed from the warehouse by fraud, was the knowledge of his principal.

In Biswell v. First National Bank of Franklin, 69 Pa. St. 415, it was held that the cashier is the agent of the corporation, not of the directors; that what he knows the bank knows, even though he should not communicate the knowledge to the board of directors. That case is exactly in line with the opinion of Judge Story in Minor v. The Mechanics Bank of Alexandria, 1 Peter, 46, in which case it was held that the cashier, in some respects, is as much the representatives of the bank as the Board of Directors, and that he can not excuse himself for improper practices even by showing an order from the board; that he is not merely the helpless creature of the board, but is the agent of the bank itself; that he can not blindly do improper things on the order of the board, much less on the order of the President.

In the Birmingham Trust and Savings Company v. The Louisiana Bank, 99 Ala. 379 (1893), it was held that the cashier's knowledge of a pledge was the knowledge of the bank, the Court saying:

> "Otherwise knowledge or notice could never be traced to the corporation, and the utmost insecurity in dealing with it would follow. And upon general principles of public policy it is and must be presumed that the agent communicates to the principal the facts of which he acquires knowledge or notice. If the communication is not made, it is the fault or neglect of the agent, which must be visited on the principal, rather than upon strangers dealing with the agent, within the scope of the agency."

To the same effect are Potter v. The Bank of Rutland, 19 Ver. 410; Central National Bank v. Levin, 6 Mo. App. 543; Holden v. The New York & Erie Bank, 72 N. Y. 286 (1878); Duncan v. Jaudon, 15 Wallace, 165.

In Veasy v. Graham, 17 Ga. 99, the president and cashier of a bank made a deed to the president of the bank's property, and this deed was set aside, the court saying:

> "The cashier had actual notice of the fact, because he aided in executing his title. To whom else should notice have been given? The stockholders or the directors or both? We know of no such practice."

In A. C. Freeman's exhaustive notes to the case of the Bank of Pittsburg v. Whitehead, 36 Am. Dec. 186 (10 Watts, 396), it is said that "a corporation must be held to know what its president and general officers know;" that what is known to the president and cashier is known to the bank; that "the cashier of a bank is its general agent, managing all its concerns, except such as are committed directly to the bank directors." To the same effect are the cases of New Hope Delaware Bridge v. Phoenix Bank, 3 New York, 156; McGurk v. Metropolitan Life Insurance Company, 1 Law Rep. Ann. 563, or 56 Conn. 528; Bank of America v. McNeal, 10 Bush (Ky.), 54; Cook on Corporations, Sec. 727; Thomson-Huston E. Co. v. The Capitol

Electric Company, 65 Fed. Rep. 341; Wilson v. Pauly, 77 Fed. Rep. 129.

In Mechanics' Bank v. Gilmartin, 93 Ga. 504, it was held, on circumstantial evidence, as in our case, that the president of the bank, who knew that the cashier was speculating and saw him in consultation occasionally with brokers and learned casually from them that he was dabbling in stocks, must be presumed to have sufficient knowledge to put him on inquiry, and his knowledge was imputed to the bank, and the bank was held liable for the bonds fraudulently converted by the cashier.

The rule we are contending for is not at all modified or impaired by the decision in the case of the American Surety Company v. Pauly, 170 U. S. 559, in which the Supreme Court recognized the soundness and the binding force of the foregoing authorities, and admitted that the general rule was the one for which we are contending. In that case the Supreme Court quotes with approval the charge of the lower court to this effect:

> "Ordinarily a corporation, like any other principal, is chargeable with the knowledge of any facts which are known to its agent, but in this case all the transactions, if there were any transactions of a fraudulent and dishonest character on the part of the cashier, were transactions for the benefit of Collins, and he was a participator in the fraud, and under these circumstances the law does not infer that the agent or the officer will communicate the fact to his principal, the corporation."

Justice Harlan, in rendering the opinion of the Supreme Court, held that, as President Collins and Cashier O'Brien were in collusion to defraud the bank, the knowledge of neither one could be imputed to the bank. because it could not be presumed that they would tell the board of directors that both of them were defrauding the bank. The Supreme Court said:

> "The presumption that the agent informed his principal of that which his duty and the interests of his principal required him to communicate does not arise where the agent acts or makes declarations not in execution of any duty that he owes to the principal, nor within any authority possessed by him, but to subserve simply his own personal ends, or to

commit some fraud against the principal. In such cases the principal is not bound by the acts or declarations of the agent unless it be proved that he had at the time actual notice of them, or, having received notice of them, failed to disavow what was assumed to be said and done in his behalf."

The Supreme Court then quotes a large number of authorities, all holding in substance that when the agent is himself trying to defraud his principal it will not be presumed that he communicates to his principal the knowledge he has, or that he tells the principal just how he is trying to defraud the principal; and then the Supreme Court continues:

"Further citation of authorities would seem to be unnecessary to support the proposition that, if Collins gave the certificate that he might, with the aid of O'Brien as cashier, carry out his purpose to defraud the Bank for his personal benefit, the law will not presume that he communicated to the bank what he had done in order to promote the scheme devised by him in hostility to its interests. In our judgment the Circuit Court of Appeals correctly held that plaintiff's right of action on the bond was not lost because its president, Collins, made to the defendants false representations as to the cashier's honesty; and that, when two officers of a corporation have entered into a scheme to purloin its money for the benefit of one of them, in pursuance of which scheme it becomes necessary to make false representations to a third person, ostensibly for the bank, but in reality to consummate such scheme, and for the benefit of the conspirators, and not in the line of the ordinary authority, the corporation being ignorant of the fraud, the officers are not, in thus consummating such theft, the agents of the corporation."

This was the principle on which the Court rested its opinion, and in so doing it laid down the law exactly as it is stated in Mechem on Agency, Sec. 718, a section which we have heretofore quoted. Mechem says there are only three exceptions to the rule that the knowledge of the agent will be imputed to the principal, and those three exceptions are the following:

"(1) Where it is such as it is the agent's duty not to disclose (as where he gets confidential knowledge as an attorney, priest, etc.), and,

"(2) Where the agent's relation to the subject-matter or his previous conduct render it certain that he will not disclose it (as where he is trying to carry out or aid another in carrying out a fraudulent scheme, such as Collins and O'Brien were carrying out), and,

"(3) Where the person claiming the benefit of the notice, or those whom he represents, colluded with the agent to cheat or defraud the principal."

In the McKnight case the Cashier was not acting in collusion with the President. There is no pretense that the Cashier was purposely trying to assist McKnight in defrauding the Bank. The proof showed that the feeling between McKnight and the Vice-President was unfriendly, and that the Cashier, on the night of the Britt and Reeder transaction, went as late as nine o'clock in the evening to the Vice-President's house to notify the Vice-President, who was a director, that McKnight, whom he disliked, had carried out that corrupt deal with Britt and Reeder. Hence it appears that the case of the American Surety Company v. Pauly is a direct authority in favor of the petitioner, and is in line with the text-books and cases cited and relied on in this brief.

But in the latest case in this Court, in the case of the Guarantee Company of North America v. the Mechanics Savings Bank and Trust Company, decided January 6, 1902, this Court practically decided our case beyond controversy. In that case this Court held that the information given by Kyle and the anonymous letter sent to the cashier, informing him of Schardt's speculations, later communicated to the president and to one or two of the directors, gave the bank all the information or knowledge it needed, and the bank was bound by this knowledge and the surety was released because the bank did not communicate that knowledge to the surety. What the president and cashier knew in that case was not more than was known to the Vice-President and cashier and Director Reisch in our case. Schardt denied that he was speculating, as McKnight tried to explain away the Britt and Reeder note; but in each case the excuse was flimsy, and, at any rate, the surety in each case had a right to know the facts,

and to decide for itself, as this Court held. The facts showing McKnight's frauds, and showing that the Vice-President and cashier and Director Reisch had personal knowledge of them, were stronger and clearer than the facts from which knowledge was imputed to the Mechanics Savings Bank and Trust Company from the information gotten by the cashier and president of that bank. Diligence and good faith were not used by the banks in either case, and this surety should be released, as that one was by this Court.

It will be contended that the contract of the Guarantee Company of North America differed from our contract; but the difference is only in non-essentials. The teller's bond in the Guarantee Company's case (and the decision turned upon that bond and the defaults and the notice due to the surety under it) is, in all essentials, exactly like the bond in this case. The defaults under the teller's bond amounted to $50,649.90 up to January 1, 1893, the date of the cashier's bond; and, though the bank got information of Schardt's speculations "in the summer or fall of 1892," the surety was held not liable even on the teller's bond.

The provision in the two bonds as to "due and customary supervision" over the employe for the prevention of default, and as to the effect of condoning the default without notice to the surety, is identically the same. Exactly alike, too, are the provisions of the two bonds as to the inspection or audit of the accounts of the employer. Practically the same are the provisions of the two bonds as to "immediate notice" of the discovery of any default, and both bonds have also this clause:

> "That the employer shall at once notify the Company on his becoming aware of the said employe being engaged in speculation or gambling or indulging in any disreputable or unlawful habits or pursuits."

In the Guarantee Company's case this Court has said that information which might be sufficient to make the employer "aware of" the employe's speculating or disreputable habits might not be

sufficient to show "knowledge." In McKnight's corrupt political trickery at the Bank, with its money, through his henchman Edmunds, he was "indulging in disreputable or unlawful habits or pursuits"; and there was certainly evidence enough to show that Vice-President and Director Reutlinger and Cashier Reutlinger and Director Reisch were "aware of" that corruption. Reisch admitted *that he knew of the corrupt purchase of Britt and Reeder* and says that Vice-President and Director Reutlinger told him of it three days after the deal. Schardt's purchase of an interest in a bucket-shop in Nashville was not more "disreputable or unlawful" than McKnight's buying councilmen and aldermen in Louisville. The officers and directors of the Mechanics Savings Bank had not more proof to make them "aware of" Schardt's guilt than the two Reutlingers and Reisch had of McKnight's guilt. The two cases must go together. They can be separated or distinguished only by quibbling.

The Court of Appeals of Kentucky in the Germania Safety Vault & Trust Co. v. Driscoll decided, on February 6, 1902, that, as the same McKnight was President of the German National Bank and also President of the Germania Safety Vault & Trust Co., and as he, as President of the Bank, knew of its insolvency, his knowledge was the knowledge of the Trust Company, and therefore the Trust Company, because of its negligence, was liable for the loss of a trust fund deposited by it in the Bank. The Court of Appeals so held because the President of the Trust Company, McKnight, "had actual knowledge at the time of the insolvent condition of the Bank, and its officers whose duty it was to look after deposits of trust accounts had heard rumors sufficient to put them on inquiry, which, if made, would have revealed to them the true condition of the Bank."

Evidently the Court of Appeals of Kentucky would have exonerated the surety on the same ground.

SIXTH POINT.

The knowledge of Director Reutlinger and Director Reisch of McKnight's defaults bound the Bank, but we understand the decision of the lower court to nullify the rule that the knowledge of a director acquired in the business of the bank is the knowledge of the bank and to be in direct conflict with the decision of this Court in the Guarantee Company of North America v. The Mechanics Savings Bank and Trust Company, decided by this Court January 6, 1902.

In this case the complainants have recovered judgment against the surety for several defaults, but the first in time was a payment of $1,000 by the cashier of the bank to S. E. Edmunds, the political manager of McKnight, in ten one-hundred-dollar bills on January 21, 1896, on the order of McKnight, who became a candidate for mayor of the city of Louisville before the General Council thereof a few days after the death of the Hon. Henry S. Tyler on January 14, 1896. With that $1,000.00 S. E. Edmunds bought four councilmen and got from them a written pledge to vote for McKnight. A race for mayor in a big city like Louisville filled the newspapers with exciting news of every possible description relative to the candidates, their history, business connections, their leaders and benchmen, and this race was of course a subject of profund interest and earnest discussion to everybody in the city, including, of course, the officers and directors and clerks of the Bank, whose President was a candidate. (R. 37.) A few days after January 14, 1896, McKnight became a candidate, and a few days after he became a candidate, to wit, January 18, 1896, he was overdrawn in bank $1,340 12. On January 20, 1896, he was overdrawn $1,460 14. On January 21, 1896, he told his Cashier to give his well-known political manager, Edmunds, who was in constant conferences about the election at the Bank itself, $1,000.00 in ten one-hundred dollar bills. (R. 35.) *He was particular to have ten bills of* $100.00 *each. Nothing else would do.* Such bills are very convenient for buying councilmen, but not especially desirable in ordinary transactions.

The Cashier, who was also teller, did not have ten bills of $100.00 each. McKnight sent him out to another bank on that peculiar mission, to get that special kind of money. The Vice-President, who was the father of the Cashier and a director (R. 36), heard the President send the Cashier and teller out to get the money in that strange way for the political boss whose headquarters seemed to be in the Bank during this exciting race; and the money was paid to the boss on his own check, when he had no money in bank and was himself in need. By the order of McKnight that check was held up by the Cashier as cash in his drawer from January 21, 1896, to March 12, 1896, seven weeks (R. 35); and then it was charged, not to to the man who got the money and who gave his individual check for it, but to S. E. Edmunds & Company, in which McKnight was a partner.

On that same 21st day of January, 1896, when McKnight was overdrawn in a large sum, he gave another check of $1,253.00 to some Louisville lawyers to pay a private claim against himself, and that check, too, at his request, was held up by the Cashier for seven weeks in his cash drawer as cash, and was not charged to anybody till March 12, 1896, and then it was charged to S. E. Edmunds & Company (R. 38). The Vice-President and director saw that this check also was being held up in this improper way by his son, and was told by the Cashier that this was being done by order of McKnight.

It can easily be understood why the officers and directors of a bank on the verge of bankruptcy might want its President to become mayor of the city and, by means of city deposits and political patronage, get the Bank a new lease on life, and why the officers in desperate straits might connive at corruption, if they did not directly aid in it, to secure his election, and why they might later conveniently forget or pretend to misunderstand the plainest features of the transaction.

A few days after McKnight's political manager had bought the four councilmen with the ten one-hundred-dollar bills, McKnight was beaten for Mayor by Mr. George D. Todd; and

there was great dissension between McKnight's gang and the successful candidate's supporters. McKnight, out of spite or because he hoped to get political patronage that would pay him and the bank, organized an opposition party; and, to block the measures of the successful mayor and to control municipal affairs, he needed seven of the twelve aldermen. He could count on five and must buy two more. Britt and Reeder were willing to sell. Edmunds was used to buy them. McKnight, on February 6, 1896, about two weeks after the purchase of the four councilmen, Jenne, Sowders, Glover, and Adams, and a few days after the election, told the Cashier and teller to keep the bank open that evening after banking hours; "that he had a big scheme on hand, and that it was a big thing" (R. 36), not that it was merely to lend a little money of the Bank in a legitimate way. At 6:30 P. M. Edmunds appeared at the Bank with two aldermen—Britt and Reeder, who had no property. Edmunds wrote out a note for $2,000.00, which was not to bear interest for a year—wrote it out in the presence of the Cashier and McKnight. But the money was not given to them at once. *They must first do something else upstairs, where "the gang" was, to get the money* (R. 37). They went upstairs over the bank, where "the gang," the other five aldermen, were waiting for them, and there they and the five other aldermen signed a written agreement to the effect that McKnight should be their political boss and that they would only vote after consulting him. *Meanwhile the Cashier was waiting for Britt and Reeder to come down for their money.* They came down, and then they were allowed to get their hands on the money, no interest being deducted in advance. Immediately, in the Bank, Edmunds demanded his part of the corruption fund, and they gave him $225.00.

At 9:30 o'clock that same evening the cashier ran to his father's house to tell him, the Vice-President and the Director, of this strange business. The next morning the Vice-President called for an explanation from the President. The President said the note was good, and that it *would* be guaranteed by two

sureties, whom he named, but they never did give the guaranty. He did not explain why $2,000 of the Bank's money was being lent for a year without interest. In the same conversation McKnight (R. 38), who "had a long yellow envelope in his hand" (containing, of course, the corrupt pledge), told the Vice-President that "those fellows (the Aldermen, known, of course, to the Vice-President and his son) had signed it, and that he would not sign that for the city of Louisville;" that "he had a meeting up stairs (while the Cashier was waiting, and of which, of course, he must have known) and that paper was signed, and he would not sign it for the city of Louisville." The language of the President could leave no doubt in any sane man's mind what he meant. To suppose that a man who had had sense enough to be President or Vice-President of a National Bank in a big city for about twenty years did not have sense enough to know that a corrupt deal had been made, and that a lot of rascals had signed an incriminating and disgraceful paper, would be unreasonable. Reisch said that the Vice-President understood it well.

The Vice-President testified that he was not satisfied with the explanation of the President; and, being really unfriendly to the President, he brought the matter before the Board and told them that he had examined into the condition of the two aldermen who had gotten two thousand dollars of the Bank's money under such suspicious and questionable circumstances, and that they had no property; that they were insolvent. McKnight then came before the Board of Directors and said that the note *would* be guaranteed by two sureties (who never did so); and that, if not, he (then heavily overdrawn and having the Cashier hold up checks for him to the amount of at least $2,253.00 as cash items in the cash drawer) would pay it himself. The directors, so child-like and bland, were satisfied. *Any thing satisfied them.* What this court said of Schardt's explanation in the Guarantee Company's case we may say of McKnight's explanation here: "How any thing but such a denial could be expected it is not easy to see, nor how careful and prudent men could have been justified in omitting independent inquiry."

All the foregoing circumstantial evidence was proven by the witnesses of the Receiver. No witnesses were called for the defendant. As to all these matters, there was no contrariety of evidence, excepting that the Cashier, to clear himself, said that he never understood what any of these queer things meant, and excepting that his father, the Vice-President, to clear himself, said that he never understood them; but one of the Receiver's witnesses, Director Reisch, honestly testified that the Vice-President did understand them; that the Vice-President, in the bank, when Reisch was discharging his duties as Director, told him, just after the Britt and Reeder transaction, just how the corruption was effected. Reisch, on direct examination by the Receiver's attorney, said:

> "No, sir; I just heard about it, about that Reeder note, about two days after, that Reeder went up that night in the bank and got $2,000.00 out, but that was about two or three days after that happened . . . Old man Reutlinger (Vice-President and Director) told me; he said the bank was open about six o'clock that night and *Britt and Reeder and the whole gang there*, he gave a note and got $2,000.00 out of the bank. . . . No, sir, I just heard after that it was for the Council race, the Todd race, something like that. . . . I heard that three days after the money was out of the bank. . . . *Q.* What was it you heard in three days after the money was out of the bank? *A.* That the bank was open after six o'clock and they got $2,000.00 out of the bank. . . . Old man Reutlinger (Vice-President) told me that. . . . That the money was used for the Mayor's race, for the Todd race. . . . *Q.* Are you certain that Mr. Reutlinger told you that? *A.* He told me, not in the director's meeting; he told me that outside. . . . *Q.* Were you not in the directors' meeting when that note was considered? *A.* Yes, sir, I believe that *that note did come up*, and McKnight said if Reeder did not pay it he would."

Vice-President Reutlinger denied this, but Director Reisch is borne out by circumstantial evidence and by the inherent probabilities. At any rate, beyond all dispute, one director, Mr. Reisch, from whatever source he got his information, knew of this corruption, and he knew it before the matter came before the board; and *the legal presumption is that he did his duty by telling the board what he knew.* Notice to him was notice to them.

The payment of that $1,000.00 to Edmunds and the payment of the $2,000.00 to Britt and Reeder were held by the circuit court and by the Circuit Court of Appeals, according to the terms of the bond, to be "acts or defaults on the part of the employe (McKnight) which would give (and did give) the employer (the bank) the right to claim" under the bond; and the bond provided that if the bank should "condone any such act or default," or should thereafter continne McKnight in its service without written notice to the surety, the bond company should not be responsible for any subsequent default. All the defaults for which the surety was held liable were these defaults and defaults that occurred later; and yet the Edmunds default and the Britt and Reeder default were clearly known at the time by the officers and several directors, and, we think, by the board itself; and those defaults were condoned; and, at any rate, the notice which was provided for in the bond was never given to the surety.

In spite of the foregoing fair statement of the evidence as it appears in the bill of exceptions, the circuit court, in the charge to the jury, said:

> "That none of them (the officers and directors of the bank) had any knowledge that any act of his (McKnight's), in the management of the said bank, was fraudulent or dishonest, until after the closing of the bank . . . That none of the officers of said bank, including the directory, had any knowledge of the various checks set up in the petition as fraudulent, etc."

The checks set up in the petition as fraudulent were the Edmunds check, the Britt and Reeder note, and the other checks that followed them, one of them being on the same date as the Edmunds check, and also held up for seven weeks as cash in the drawer. Every fraudulent act of McKnight described above he was able to do and did do "in the performance of the duties of his office or position." Every thing he did he was able to do by reason of his power as President, and every one of those acts was done in the Bank itself. His orders to the Cashier and his dealings with Edmunds were in the Bank itself; and Cashier

Reutlinger and his father, Vice-President, and Director Reutlinger, learned of all these things in the Bank, in due course of its business, and while they were respectively engaged in attending the business of the Bank.

The Court also told the jury positively that Cashier Reutlinger and Vice-President and Director Reutlinger did not understand the fraudulent nature of the Edmunds check for $1,000.00 or the Britt and Reeder note for $2,000.00. The Court also told the jury, in substance, that if the Cashier or Vice-President or any individual directors knew of these frauds and concealed them from the surety, the surety would still be liable unless "THE BANK," that is, the Board of Directors, as such, had knowledged of the frauds, practically had formal notice of them. The Court, in the 7th Instruction (Rec. 61), said:

> "The testimony in respect to the knowledge of THE BANK of the purpose for which the $2,000.00 was taken out at half past six or seven in the evening, I say the knowledge of THE BANK respecting that, must be proven, in my judgment, in such a way as to satisfy the jury that THE BANK, *as distinguished from any mere director of it, knew* of that transaction. . . . If you believe from the evidence that THE BANK did know of this fraudulent purpose, and that this default of McKnight's, this fraudulent act of McKnight's in getting this $2,000.00 was known to the Bank at the time, then I instruct you that all of the liability of the defendant in this case would cease then, that being the earliest, or one of the earliest, if not the earliest, of all these transactions. If you believe from the evidence that this transaction was known and condoned by THE BANK at the time, before these other transactions occurred, then the defendant in this case is not liable. But, if you believe on the contrary that THE BANK did not know it, that it was the fraudulent act of McKnight alone, not participated in by *the Bank—when I say the Bank, I mean the Bank, I do not mean any individual director*—then the defendant is liable. . . . The defendant objected to that portion of the charge because it declared that the knowledge of an individual director or directors of the acts of McKnight was not the knowledge of the Bank, and the jury should have been instructed that the knowledge of the Vice-President, who was a director, and of Mr. Reisch, a director, should be imparted to the Bank itself; but the court erroneously overruled the objection of defendant and let said instruction stand."

The jury must have understood this to mean that, even though they should differ from the court and should believe that Director Reutlinger and Director Reisch, and even other directors, did know of McKnight's frauds, still their knowledge was not the Bank's knowledge, and that only a formal action of the board of directors of the Bank or a formal notice to the board of directors could be said to prove the knowledge of the Bank. If that be sound law, it will be practically impossible ever to bring guilty knowledge home to "the Bank" itself or to the board of directors as a board; and yet the Circuit Court of Appeals, giving a similar quotation form the charge, says: "We think this instruction as favorable as the Company was entitled to." If this be a fair statement of the law, directors of a corporation who wanted to indulge in questionable or corrupt practices with impunity could and would always find it easy and expedient to keep their information and records in such shape that nobody could bring out proof of guilty knowledge on the part of the corporation or board of directors.

This very case illustrates the impossibility of proving corrupt actions in the way required by the Court. Here not a witness could defendant find or introduce to prove these bald, unmistakably corrupt transactions. All proof of them had to be extorted by cross-examination from unwilling witnesses, whose interest and wish it was undoubtedly to shield themselves from blame by saying that they did not understand what any boy of sixteen or any man of the dullest mind could have understood if he did not have a motive for refusing to understand. Let it be noted that all the incriminating circumstantial evidence against Vice-President Reutlinger, Cashier Reutlinger, and Director Reisch was admitted by them. Director Reisch admitted that he was told and, at any rate, thoroughly understood the corruption in the Britt and Reeder loan. Vice-President Reutlinger admits every thing, except that he denies that he saw or knew of the actual purchase of the four councilmen and the contents of their pledge or the contents of the corrupt pledge by the seven aldermen, including Britt and Reeder. He admits he knew every thing

else about those two transactions. So does the Cashier. Let us concede, for the sake of argument, that we had never been so lucky as to prove by cross-examination of complainant's own witnesses the actual payment of the Edmunds' $1,000 to the four councilmen and the contents of the written pledge, and the contents of the corrupt Britt and Reeder loan; let us concede that, and still there would be enough evidence to show knowledge of McKnight's guilt by Vice-President Reutlinger, Cashier Reutlinger, and Director Reisch. Vice-President and Director Reutlinger tells enough to show this, for he admits that he overheard McKnight's directions to the Cashier about the ten one-hundred-dollar bills, etc., and he admits that his son told him of the Britt and Reeder loan the same night, and that next morning he called McKnight to account, when the latter had in his hand the yellow envelope, and which he then showed Vice-President Reutlinger, saying (as appears in the Bill of Exceptions, R. 38) that "*those fellows* had signed it, and that he would not sign that for the city of Louisville;" that "he had a document there in his pocket which was signed by those fellows," "the gang," as Reisch called them; that "he had a meeting up stairs (as the Cashier knew the evening before), and that paper was signed, and he would not sign it for the city of Louisville." This conversation was had with him by the Vice-President when the Britt and Reeder matter was being discussed."

Even if Vice-President Reutlinger and Cashier Reutlinger and Director Reisch did not know the contents of those two corrupt pledges, or did not see the money paid, they at any rate knew enough to put them on inquiry—to make it their duty to investigate fully. When Vice-President Reutlinger, as he admits, began the investigation into the corrupt loan to Britt and Reeder, and reported it to the Board of Directors, it was his duty and the duty of the board to sift the matter to the bottom. As this Court said in the Guarantee Company's case:

> "It (the surety) had the right to investigate for itself whether the bank did so or not. Notification of the existence of reason for inquiry was exactly what the clause was

intended to secure. The bank neither investigated nor gave the Company notice of the information it had, and substituted its own judgment as to the value of that information for that of the Company. In our view this conduct on its part amounted to a breach of the stipulation."

The slightest investigation would have brought this corrupt matter to light. Political matters of that character, widely discussed in the newspapers, can not be concealed, and the officers and directors of the bank had enough information to enable them to probe the matter to the bottom. Edmunds, the political boss, and the aldermen and councilmen involved, could be easily investigated. The language of the Circuit Court of Appeals, fairly interpreted, practically lays down the doctrine that a bank or any other corporation can escape the duty of investigation and of exercising "due and customary supervision," and can escape the penalty of fraudulent action by merely pretending to be satisfied with a trivial investigation and flimsy pretenses, such as McKnight offered, and by not passing any resolution as a board, or by not allowing any record or communication to be made of matters well known to the directors and officers individually. When we said that the directors in this case knew the fraud in the Edmunds transaction, and in the Britt and Reeder transaction, we were answered with the statement that those were questions of fact which were found against us by the jury, but the jury were compelled to ignore the proof as to those facts, because they were told in the charge that the knowledge of the individual directors or of the officers made no difference—that such knowledge was not the knowledge of the Bank, and that we could escape only by proving notice to the Bank itself or its Board of Directors, apparently in formal session. The verdict of the jury can not be construed to mean that the jury believed that the officers and individual directors were ignorant of the fraudulent nature of the Edmunds check and the Britt and Reeder loan, because the jury were told, as a matter of law, that the knowledge of the Cashier and the Vice-President, or of the individual directors, was not the knowledge of the Bank, and could not exonerate the surety.

As Director Reisch admitted that he knew, two or three days after the Britt and Reeder loan, of the corrupt nature of that loan, the jury would have been compelled to find for the surety, if they had not been told that any knowledge of Reisch alone of that corrupt deal was not the knowledge of the Bank, and would not justify a verdict for the surety. Not a syllable of evidence was there to contradict the admission of Director Reisch that he knew of this matter, even though there might be a dispute as to who gave him the information—whether it was Vice-President Reutlinger or somebody else.

The Circuit Court of Appeals, in its opinion, says:

> "We must remember that this obligation was intended to secure the Bank against the fraudulent conduct of McKnight in the performance of the duties of his office or position; that McKnight's action, in order to require notice to the company, must have been 'of the discovery of any default or loss under the bond.' While McKnight MIGHT *have been guilty of reprehensible conduct*, it would not require notice unless such as might result in the loss of securities, or money, or personal property of the bank by fraudulent conduct in the performance of his duties to the bank."

This is very mild language for a court of justice to apply to McKnight's purchase of four councilmen and two aldermen, and his causing his private debts to be paid on his own checks when he was overdrawn in a large mount, and when he caused his checks to be held up as cash for seven weeks, and then had them charged to an improper account; but, waiving that mild censure of such conduct, it must be said that every act of McKnight's of which we complained was an act for which we were compelled to pay under our bond, because of his "fraudulent conduct in the performance of his duties to the Bank." Of all those acts so well understood we were entitled to notice at the time under the terms of our bond.

The Circuit Court of Appeals says further:

> "Misconduct which would not amount to a fraudulent act affecting the duties of the officer of the bank, would not require notice unless it came within that clause of the bond which requires the employer to notify the company

> when the employe engages in gambling or speculation, or indulges in disreputable or unlawful habits or pursuits. Whether McKnight's conduct was of this character, the court left the jury to determine. They must have found that there was no such misconduct as would avoid the bond while the bank was in operation, and which it was the duty of the bank to report to the company."

In the first place, all of McKnight's misconduct consisted in "fraudulent acts which affected his duties as an officer of the bank." In the next place, it could not be said that the jury "must have found that there was no such misconduct as would avoid the bond while the bank was in operation, and which it was the duty of the bank to report to the Company," for the simple reason that the charge of the court below practically told the jury that the fraudulent acts of McKnight were unknown to the officers of the Bank and to the Directors of the Bank, and that no matter how fraudulent his conduct might be, and no matter how well the Vice-President, the Cashier and Director Reisch might have known of his misconduct, we could not be exonerated unless "the Bank" itself, that is, the Board of Directors, had formal notice of his misconduct, or, in some unmistakable way, as a board, connived at his misdoings.

The Circuit Court of Appeals also says:

> "In this connection it is averred that the Court erred in saying that this knowledge must be the knowledge of the bank, intending thereby to exclude the knowledge of individual directors. In the charge above quoted, as to the knowledge of the bank directors, we have already said that we find no error. We have carefully examined the record and find no knowledge brought home to the directors individually or the cashier in his individual capacity which was not brought to the attention of the Board, which would amount to a default under this bond. Such knowledge, in order to be binding upon the bank, must have been acquired in the course of business of the bank by such officer or director."

In the first place, we have shown from the Bill of Exceptions that Mr. Reisch, a director, testified that Vice-President and Director Reutlinger in the Bank itself told him two or three days

after the Britt and Reeder loan that $2,000.00 had been gotten from the bank by two of the "gang," whom McKnight had at the bank at 6:30 P. M., and that it was used "for the council race, the Todd race, something like that." This would certainly "amount to a default under this bond." And nobody has ever pretended that this information was brought in this straight and direct form to the atttention of the Board itself; but as two directors had the information, the legal presumption is that they gave their information to the Board. If the admission of Director Reisch as to what he was told by Vice-President and Director Reutlinger is not sufficient to show that these two directors knew of the corrupt use for which the Britt and Reeder loan was made, then no such fraud could ever possibly be satisfactorily proven. The résumé above of the circumstantial evidence and the Cashier's own admissions show that the jury could have found, and we believe would have found, if correctly instructed, that the Cashier did have knowledge in his individual capacity of these frauds. All the knowledge which Vice-President and Director Reutlinger and Director Reisch and Cashier Reutlinger had was "acquired in the course of business of the bank transacted by such officer and director" in the bank. They got, so far as the proof shows, no knowledge outside of the bank or when they were transacting any business except that of the bank itself. After reading the bill of exceptions, showing the direct testimony of Director Reisch and the admissions of Vice-President Reutlinger and Cashier Reutlinger, we are at a loss to understand how this could be said in the opinion of the Circuit Court of Appeals:

> "The testimony shows no such knowledge of McKnight's conduct acquired in the bank's business by the individual directors or officers of the bank and unknown to the Board, as would entitle the Company to notice."

If we were entitled to notice at all of any of these fraudulent and disgraceful proceedings connected with the Edmunds check for the purchase of four councilmen and the Britt and Reeder loan

for the purchase of two aldermen, then undoubtedly the knowledge of these transactions had by Cashier Reutlinger and Vice-President and Director Reutlinger and Director Reisch was undoubtedly acquired in the Bank's business, and, according to the Receiver's testimony, that knowledge was never directly communicated to the Board as a board. Surely the highest court in our land ought to avail itself of a chance to say whether such reprehensible and disgraceful conduct on the part of the President of a bank, as occurred in this bank, can go on unchecked and unreported by the officers and directors of a bank, and yet there be no duty on the part of the bank to the surety who guaranteed the faithful conduct of the President, and who would be entitled to notice of any conduct of his in connection with the bank that would be likely to inflict a heavy loss upon his surety. We have shown that Director Reisch by performing his duty as director in looking into the affairs of the bank, in the bank building itself, learned, whether from the Vice President or not is immaterial, of the corrupt political deal between McKnight and Britt and Reeder, whereby the bank's $2,000.00 was lent without interest for a year to two insolvent city politicians; and yet The Circuit Court of Appeals in its opinion quotes with approval this language from Boone on the Law of Banking, Section 132:

> "A notice to one or more of the directors when engaged in the business of the bank will be deemed notice to the bank."

If that be sound law, why did the Bank or the Board of Directors not have notice (quoting the identical language of Reisch from the Bill of Exceptions) that "the bank was open about six o'clock that night and Britt and Reeder and *the whole gang* there; he gave a note and got $2,000.00 out of the bank;" that "it was for the Council race, the Todd race, something like that;" "that the money was used for the Mayor's race, for the Todd race."

Can it be that the surety under this bond was not entitled to notice of such outrageous corruption as that, when the Bank

knew it, because Director Reisch knew it, to say nothing of Vice-President Reutlinger and the Cashier? Here (to use the language of this Court in American Surety Company v. Pauley, 170 U. S. 147) was "not simply a suspicion of the existence of such facts as would justify a careful and prudent man in charging another with fraud or dishonesty;" on the contrary, here was knowledge of such political corruption with the funds of the Bank as would justify any careful and prudent man, any honest man, in charging the President with fraud and dishonesty. If the Bank could allow its President to go on in such conduct without notice to a surety, who could afford to be a surety on his bond? There can be no dispute of the fact that Vice-President Reutlinger, as well as Reisch, knew that the Bank, at McKnight's request, was kept open until 6:30 P. M. to lend $2,000.00 of the Bank's money, without interest for a year, to two members of the Board of Aldermen, before whom McKnight had been a candidate for Mayor a few days before, and that those men had no property and gave no surety. This much, at least, was discovered by Vice-President Reutlinger and reported to the Board of Directors in formal session. When the Board went that far under these suspicious circumstances, it was the duty of the Board to probe the matter to the bottom. As this Court said in Martin v. Webb, 110 U. S. 7, 15, in speaking of the diligence which directors must exercise:

> "That which they ought, by proper diligence, to have known as to the general course of business in the bank, they may be presumed to have known in any contest between the corporation and those who are justified by the circumstances in dealing with its officers upon the basis of that course of business."

In Clerk's Savings Bank v. Thaw, etc., 2 Mo. App. 367, one director was told for whose benefit a certain note in controversy was discounted, and this director (like Director Reisch) was present in the board as a director when the note was offered for discount and received by the bank. The court said:

"We think this evidence quite competent, as tending to show notice to the bank that the paper was made for the accomodation of Morse & Co., and not of the Sectional Dock Company, and putting them on inquiry as to Drew's power and authority to make or endorse paper in the name of the Dock for any such purpose."

In the case of the National Bank of Asheville v. Fidelity and Casualty Company, 89 Fed. Rep. 819 (1898), it was held that the knowledge of the president of the dishonesty and flight of the cashier, before the bond was renewed, bound the bank and made the bond voidable. The court held:

"While under a bond insuring the fidelity of an employe, which requires the employer to make disclosure of any dishonesty of the employe known to him, the employer is not bound to use diligence to discover such dishonesty, yet where in the exercise of ordinary and reasonable care and prudence in giving attention to facts known to him, he could not have failed to draw the inference that the employe was a defaulter, he may properly be charged with knowledge of such fact."

To the same effect is Thompson on Corporations, Sec. 5224. Union Bank v. Campbell, 4 Humphrey, 394. Bank of Pittsburg v. Whitehead, 10 Watts, 397; 36 Am. Dec. 186. Smith v. South Royalton Bank, 32 Ver. 341; 76 Am. Dec. 179. City Bank of Columbus v. Philips, 22 Mo. 85; 64 Am. Dec. 254.

We have here a case like that of Graves v. The Lebanon National Bank, 10 Bush (Ky.) 23, in which Judge Lindsay said:

"There is no principle of law more settled than that persons proposing to become sureties to a corporation for the good conduct and fidelity of an officer to whose custody its money and other valuables are to be intrusted, have a right to be treated with perfect good faith. . . . We have, therefore, a case in which the directory of the bank held out to others as a trustworthy officer a man who had been guilty of repeated embezzlements and frauds, all of which might have been discovered by the exercise of slight diligence."

In Morse on Banks and Banking, Sec. 134, it is said:

"The general rule actually adopted is as follows: If the director acquired it (knowledge) in his official capacity,

or in the course of or in relation to any special matter or function of which he had charge as an agent of the bank, then he knows it as a director, and the law holds that the bank also knows it. . . . Whatever knowledge a director acquires within the scope of his official employment he is bound to communicate to his co-directors, that is to say, to the bank itself. If he neglects to do so, the bank is liable for the neglect of its agent to perform the duty of his agency. By either road the same conclusion is arrived at, which is the liability of the bank to the same extent as if it had known what its director knew and ought to have communicated." Sec. 133: "What the directors ought to have known by proper diligence as the general course of the course of the bank's business they are presumed to have known in a contest between the bank and third persons dealing with it in good faith."

Not only in this case have we the direct and unqualified admission of Director Reisch that he knew how corruptly the $2,000.00 had been lent to Britt and Reeder for a year without interest, but we have also strong circumstancial evidence to show that the vice-president and other directors and the cashier knew of McKnight's defaults.

In Tolbridge v. Betsworth, 30 Conn. 380, it was held that, as a general rule, what the directors of a corporation know regarding matters affecting the interests of the corporation the corporation will be held to know, and *knowledge on the part of the directors may be inferred from circumstances*, and it is not always necessary to show it by direct proof.

In the case of the Conn. Mutual Life Insurance Company v. Scott, 81 Ky. 540, the court exonerated a surety because the Insurance Company had not notified the surety of its agent that the agent had been in default and had taken his son into partnership with him. The court said:

"A brief recitation of them (the facts shown by circumstantial evidence) will be sufficient argument to show that the appellant knew, or ought to have known, of the existence of the partnership, and actually acquiesced in its conduct of the business of the agency. . . . And it will not be allowed to draw a distinction between the knowledge of its president and other officers who transact the daily business

of the company, and knowledge received by its board of directors in official session, for the purpose of escaping the effect of such a knowledge. There are two good reasons for disallowing such a distinction in a case like this—first, because information coming to the officers elected by the board, and entrusted with the daily transactions of the business of the company and those who deal with it, and which is necessary or naturally connected with its performance, and which such officers are in duty bound to disclose to the board, must be treated as the information of the board and binding upon it; second, because if this were not so, all advantages would be given the company in admitting or denying the information, which might never find it way to the board in official session or in its technically official capacity, although its president and other officials might possess the information and be the only channel through which it could ordinarily be communicated to the board."

But this question also is conclusively settled by the decision of this court in Guarantee Company of North America v. The Mechanics Savings Bank and Trust Company, decided January 6, 1902. In that case, as in this, the information of the teller's speculations was received first by the cashier from Kyle and an anonymous letter; then the cashier told the president, and finally he and two of the directors (not at a meeting of the board) asked Schardt about his speculations and he denied it. This information was held to bind the bank and release the surety. In our case, the knowledge of Cashier Reutlinger and of Vice-President and Director Reutlinger and Director Reisch must be held to bind the bank to the same extent and to release the surety.

In the Guarantee Company's case the officers and directors said they were deceived by their confidence in Schardt; that they were not acting in bad faith; and the same flimsy excuse is made in our case. But, in the other case, it was said by this Court that such an excuse could not relieve the officers and directors of the consequences of their neglect at the expense of the surety; and the same answer must be given here.

SEVENTH POINT.

The negligence of the Directors was a failure to use "due and customary supervision," and released the Surety.

My *seventh point* is that the Court erred in telling the jury in the Eighth Instruction (Rec. 62) that the carelessness of the directors in the management of the bank was not an issue for them to consider. The jury had been unable to agree the first day, and on the second day asked a question of the Court in writing, and the answer of the Court, we contend, was misleading, and thus brought about a verdict which otherwise would not have been rendered for the plaintiff. The jury asked the Court in writing the following question: "If the jury agree that the directors of the Bank were careless in the management of the Bank, are the jury to find for the defendant?" The jury were evidently considering that, under the contract of the Bank with the Surety Company, it was the duty of the directors to observe "due and customary supervision over the employe for the prevention of default," and that "if the employe should at any time during the currency of this bond condone any act or default on the part of the employe which would give the employer the right to claim hereunder, and should continue the employe in its service without written notification to the Company, the Company shall not be responsible, etc." To this question of the jury the Court replied (Rec. 62) as follows:

> "Gentlemen of the jury, no such issue as that stated in this question was presented. The mere question of whether or not the directors generally were careless in their management of the bank is not a question for your consideration, nor would it exempt the defendant from the obligation imposed by the bond sued on. You have already been instructed as to the meaning and effect of the condition of the bond as to due and customary supervision, and outside of that there is no provision as to carelessness."

It is evident that the jury did not believe that the directors had exercised proper supervision over McKnight. It is evi-

dent that the jury believed that the directors either knew of his defaults or could have known of them by slight care, and, therefore, the jury evidently wished to find for the defendant, if they could do so on that ground. The Court had told them that the surety was not released unless the board had specific, formal notice brought to it of McKnight's defaults. In the nature of things, we could make no such proof; but the jury evidently thought that several of the directors, as well as the cashier, knew of his defaults, and that all of the directors or the Board itself would have known of his defaults if they had not been "careless in the management of the bank."

The Supreme Court said in Martin v. Webb, 110 U.S. 15:

"Directors can not, in justice to those who deal with the bank, shut their eyes as to what is going on around them. It is their duty to use ordinary diligence in ascertaining the condition of its business, and to exercise reasonable control and supervision of its officers. . . . That which they ought, by proper diligence, to have known as to the general course of business in the bank, they may be presumed to have known in any contest between the corporation and those who are justified by the circumstances in dealing with its officers upon the basis of that course of business."

Briggs v. Spalding, 141 U. S. 132.

In Marshall v. Farmers M. S. Bank of Am., 85 Va. 673; 17 Am. St. Rep. 84, the directors of a bank, for their negligence and carelessness, were held personally liable to the creditors of the bank. After reciting this negligence, the court said:

"Ignorance on the part of directors of a bank of any fact which it is their duty to know can never be set up by them in defense or exculpation for any act which the existence of that fact should have prohibited. . . . Directors, as trustees of a corporation, are bound to manage the affairs of the company with the same degree of care and diligence which is generally exercised by business men in the management of their own affairs. . . . It is difficult to concede that they could have been ignorant of all this. But suppose they were. Their duty required that they should have looked well into all these matters; and if they have negligently trusted them to others, and loss has occurred, should it fall on them or upon the depositors who had trusted them, and whose trust they had accepted, and to whom they had solmnly promised such care and attention as were to be expected of good business men?"

In the United So. of Shakers v. Underwood, 9 Bush, 609, 621, it was held that directors of a bank are personally liable for their carelessness or neglect. Judge Lindsay said:

"It is the duty of the bank directors to use ordinary diligence to acquaint themselves with the business of the bank, and whatever information might be acquired by ordinary attention of their duties, they may, in controversies with persons transacting business with the bank, be presumed to have. They can not be heard to say that they were not apprised of facts shown to exist by the ledgers, books, accounts, correspondence, reconcilements, and statements of the bank, and which would have come to their knowledge except for their gross neglect or inattention.

"It is not necessary in many cases to show directly that the directors had their attention called to the mismanagement of the affairs of the bank, or the misconduct of the subordinate officers. It is sufficient to show that the evidences of mismanagement or misconduct were such that it must have been brought to their knowledge unless they were grossly negligent or willfully careless in the discharge of their duties. If it shall turn out upon the trial of these actions that the ledgers, books, etc., of the bank showed that the special deposits of these appellees were being sold, and that this fact would have been discovered by appellees by the use of ordinary diligence, then the presumption of actual knowledge will arise. It follows, therefore, that the allegation of notice is sufficient."

In People v. Jansen, 7 Johns. 331, the sureties on a bond were released because of the neglect or carelessness of the officers of the State in exercising proper supervision over the officer in default.

The court said:

"The statute makes it the duty of the supervisors to annually meet and inspect the accounts of the loan office. The security had a right to look to the provisions of the statute and calculate his liability on the presumption that the duties enjoined upon these public officers would be faithfully and punctually discharged, and if so, he could in no event be liable for more than one year's deficiency. There can be no douht plaintiffs are chargeable with the consequence of the neglect or breach of duty of their agents or public officers intrusted with the business."

The directors of the German National Bank, under their agreement to exercise care and supervision to protect us from

McKnight's defaults, could not shut their eyes, lay down the bars, encourage or connive at his wrongdoing, and then ask us to pay their losses so negligently or willfully incurred. *Volenti non fit injuria.*

In the Board of Education v. The Citizens Insurance Company, 30 U. C. C. P. (Canada) 132 (see Note 19 C. C. A. 276), the guaranty proposal contained certain statements which were made to form a part of the contract, one of which was that the employe's books should be balanced and closed at the end of each year, and that the cash and securities to plaintiff's credit at each balancing time would be examined and verified by the auditors, as required by the statute. There was, in fact, no audit. It was held that the terms of the contract had not been complied with, and there could be no recovery.

In the case of the Harbor Commissioners v. The Guarantee Company of North America, 22 Can. Sup. Ct. 542 (see Note 19, C. C. A. 276), the policy was granted upon the express conditions that (1) the answers contained in the application embodied a true statement of the manner in which the business was conducted and the accounts kept, and that they would be kept; (2) that the employers would give notice to the surety company immediately upon its becoming known to them of any default or dishonesty on the part of the employe. The employe defaulted, and evidence showed that no proper supervision had been exercised over his books; and, further, the grantors were not notified until a week after the employers had full knowledge of the state of affairs and the employe had left the country. It was held that there could be no recovery under the policy.

In the case of Phillips v. Foxall, L. R. 7 Q. B. Div. 666, it was said:

> "We think that in the case of a continuing guaranty for the honesty of a servant, if the master discovers that the servant has been guilty of acts of dishonesty in the course of the service to which the guaranty relates, and if, instead of dismissing the servant, as he may do at once and without notice, he chooses to continue in his employ a dis-

> honest servant, without the knowledge and consent of the surety, express or implied, he can not afterward have recourse to the surety to make good any loss which may arise from the dishonesty of the servant during the subsequent service."

The directors are the agents of the bank, and are selected by the stockholders for its management; and the corporation ought to be responsible for the derelictions of the directors. If the directors, for several years, utterly ignore their duties and allow the bank to be defrauded when ordinary care on their part would prevent such effect, the corporation, as against a surety, ought not to be relieved of the natural results of their neglect. It is true the surety here has bound itself for the fidelity of the President, but that was upon the express contract of the Bank that its Board of Directors would exercise "due and customary supervision" over the President to prevent any default. Where there is no such contract on the part of the bank it may be that the surety should not be released by the failure of the board to do its duty; but, under such an express contract, the failure of the board to do its duty ought to be and is a good defense on the part of the surety.

We respectfully but earnestly insist, especially in view of the decision of this Court in the case of the Guarantee Company of North America v. The Mechanics Savings Bank and Trust Company, that we have not had a fair trial in this case and that it should be reversed. The Circuit Court of Appeals, that heard both these cases, decided twice by a unanimous vote against the Guarantee Company, but affirmed this case by a divided court; and it is plain that the facts call more loudly for the exoneration of the surety in this case than in the other.

ST. JOHN BOYLE,
EDWARD J. MCDERMOTT,
THOMAS A. WHELAN,
Counsel for Petitioner.

No. 178.
Brf. of Smith for Def. in Error.

FILED
FEB 25 1902
JAMES H. McKENNEY,
Clerk.

Filed Feb. 25, 1902.

Supreme Court of the United States

OCTOBER TERM, 1901.

The Fidelity and Deposit Company of Maryland,
Plaintiff in Error,

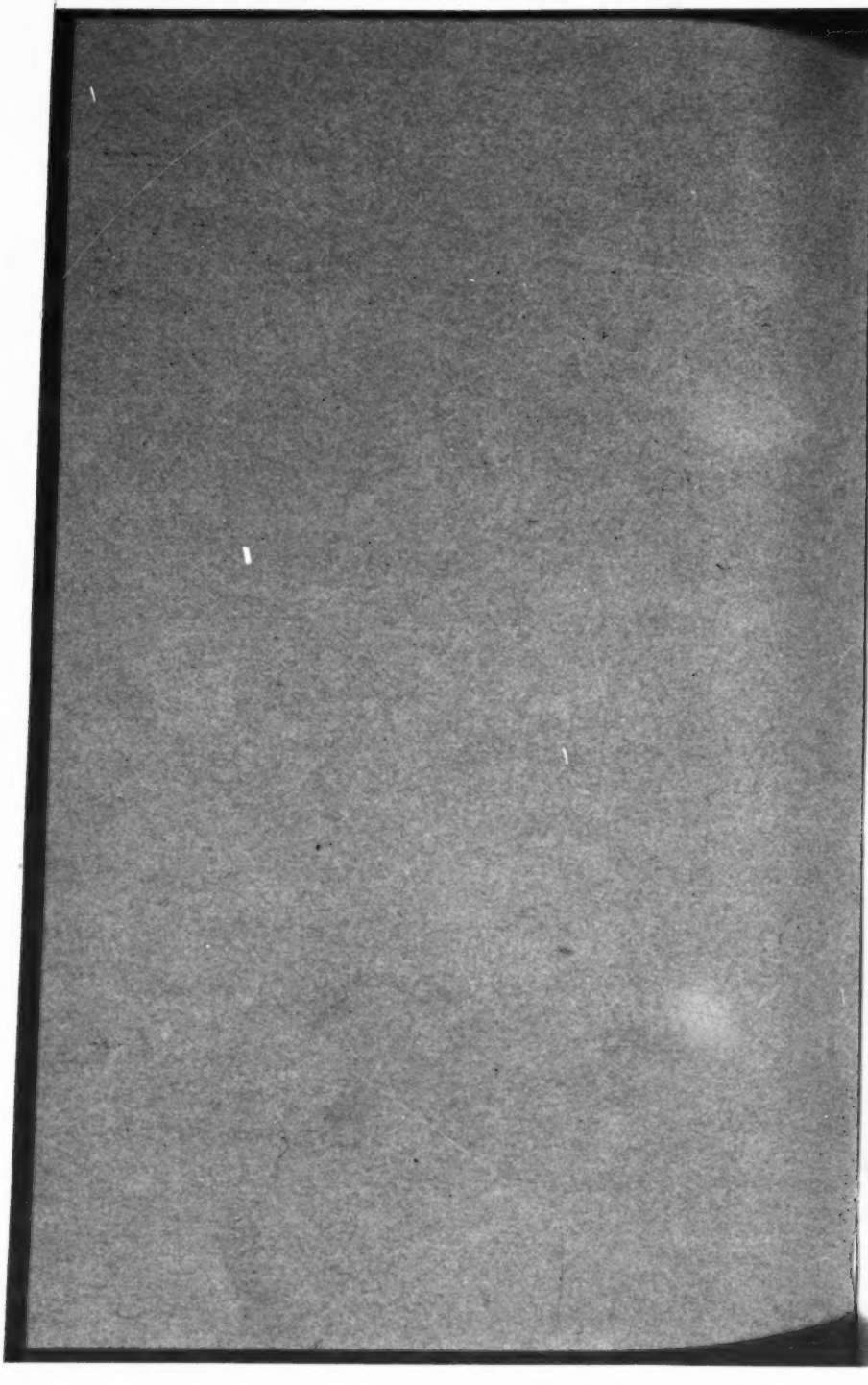
VERSUS

R. H. Courtney, Receiver of the German National Bank of Louisville, - *Defendant in Error.*

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Brief for Defendant in Error.

W. M. SMITH,
Attorney for Defendant in Error.



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Cook on Corporations, fourth edition, Sec. 727, page 1564.
C. N. Bank vs. Clark *et al.*, 139 New York Reports, pages 312, 313 and 314.
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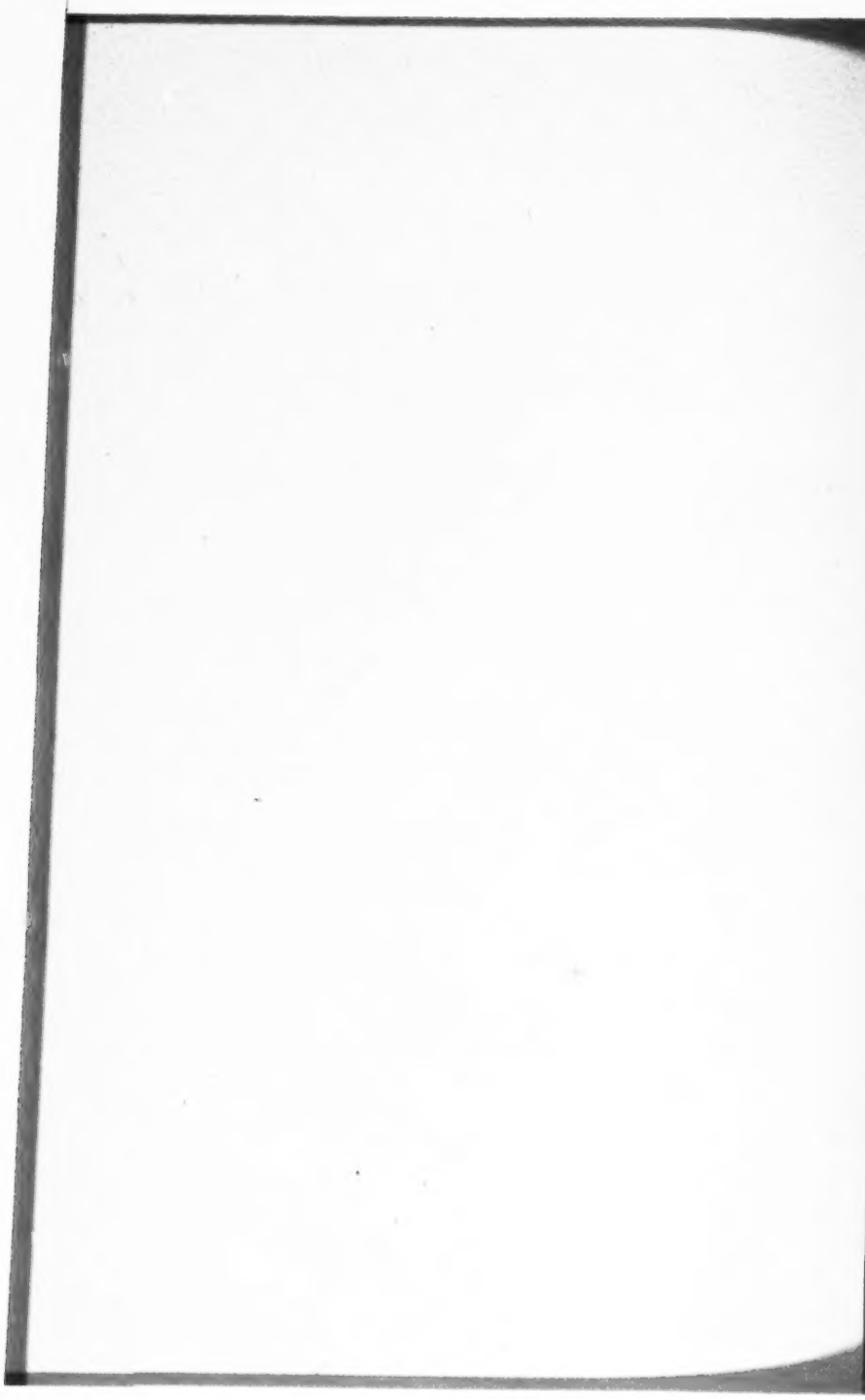

21503

Supreme Court of the United States.

THE FIDELITY AND DEPOSIT COMPANY OF MARYLAND, ... *Plaintiff in Error,*

VS.

R. H. COURTNEY, RECEIVER OF THE GERMAN NATIONAL BANK, . . *Defendant in Error.*

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT.

On February the 5th, 1898, R. H. Courtney, as receiver of the German National Bank, filed this suit against the Fidelity & Deposit Company of Maryland, on a bond for $10,000, given by said Company to said Bank for the fidelity of J. M. McKnight, as President of said Bank.

On June 1, 1894, J. M. McKnight was elected Vice-President of this Bank, and executed bond for the period of one year. On June 1, 1895, he was elected *President*, and said bond was renewed by renewal receipt by plaintiff in error for the period of one year from said date, *but said renewal was for the fidelity of J. M. McKnight as President*, and was again so renewed June 1, 1896, for the period of one year. (Renewal Receipts, Record, page 6.)

The amount of loss to the Bank, charged in the petition, is $18,742.74. The items are of dates and amounts as follows:

June 11, 1894,	$252 09
January 21, 1896,	1,000 00
January 21, 1896,	1,253 00
February 6, 1896,	2,000 00
February or March, 1896,	1,650 00
June 8, 1896,	3,736 60
January 4, 1897,	379 96
April 6, 1895,	4,400 00
November 21, 1896,	2,627 94
March 19, 1895,	1,000 00
Sundry Items,	443 15
	$18,742 74

An answer and two amendments thereto were filed, also a reply to the answer and first amendment—*except the first paragraph thereof;* this paragraph was withdrawn by plaintiff in error, by agreement (see R., page 19); by said agreement defendant in error was permitted to controvert the affirmative allegations of the second amended answer of record.

A jury trial was had, which resulted in a judgment for the defendant in error for the sum of $10,000, the amount of said bond.

There are only six provisions in the bond that it is deemed necessary to consider in determining the questions submitted; they are found on page 29 of the record, and are as follows:

1. "That the Employer shall immediately give the Company notice in writing of the *discovery of any default or loss hereunder*, and shall file with the Company his or their claim hereunder, with full particulars thereof, as soon as practicable thereafter, and no claim which shall not be so filed by the Employer with the

Company within six months after the expiration or cancellation of this bond, or within six months after the Employee shall have ceased to be in the Employer's service, shall be payable hereunder."

2. "That upon notification to the Company of any loss hereunder, the Company's liability shall thereupon terminate as regards any subsequent act of the Employee."

3. "That the Employer shall observe, or cause to be observed, due and customary supervision over the Employee for the prevention of default; and if the Employer shall at any time during the currency of this bond condone any act or default on the part of the Employee which would give the Employer the right to claim hereunder, and shall continue the Employee in its service without written notification to the Company, the Company shall not be responsible hereunder for any default of the Employee which may occur subsequent to such act, or default so condoned."

4. "That there shall be a complete inspection of the accounts and books of the Employee on behalf of the Employer at least once in every twelve months from the date of this bond, such inspection to include examination of all cash and securities of which the Employee shall have custody or charge."

5. "That no suit or proceeding at law or in equity shall be brought to recover any claim under this bond unless the same shall have been commenced within twelve months (365 days) from the date of the first notification by the Employer to the Company of any loss hereunder."

6. "That the Employer shall at any time, upon the request and at the expense of the Company, afford and render all information, evidence and assistance capable of being afforded by the Employer, for the purpose of prosecuting and bringing to justice the Employee for

any criminal offense committed by him involving liability of the Company hereunder, or for the purpose of enabling the Company to procure reimbursement by the Employee, or his estate, of any sum paid by, or recoverable from the Company under this bond."

The evidence embraced in the bill of exceptions (see Record, page 39) shows that during the times the embezzlement occurred, the German National Bank carried upon its books an account known as "The Louisville Deposit Bank Account," representing collaterals held for collection and money belonging to said insolvent concern; also an account known as "E. G. Williams, Special," said Williams being a whisky broker and selling the whisky belonging to said Louisville Deposit Bank held as collateral; and also another account known as "S. E. Edmunds & Co.," said firm being composed of S. E. Edmunds and said J. M. McKnight, and being engaged in the purchase and sale of tobacco and keeping warehouse receipts pledged to the Bank as collateral.

That the amounts charged as having been embezzled grew out of transactions of said McKnight, carried on in person, and were charged by the different clerks to these above mentioned accounts, according as McKnight might direct; that McKnight was giving all these matters his special attention, and all charges that were made to said accounts were made by his directions. That S. E. Edmunds, who drew out the $1,000 charged to have been embezzled January 21, 1896, was the Edmunds of S. E. Edmunds & Co.

On page 44 of Record it shows, to-wit:

"There was also evidence tending to show that J. M. McKnight was President of the Bank, and the other officers of the Bank, including the directory, had entire confidence in his honesty and integrity up to the time the Bank was closed; that none of them had any knowledge that any act of his in the management of said Bank was fraudulent or dishonest until after the closing of the

Bank; that said Bank had a discount committee, who regularly examined and passed on the papers of the Bank, as required of such committee, and the directory of said Bank undertook to make a monthly investigation, sometimes twice a month, of the affairs of said Bank, and required the President to go through with them and make a full report thereon; that some of the directors were in the Bank almost daily inspecting its affairs, and that they did at all times observe due and customary supervision over said President for the prevention of default; that none of the officers of said Bank, including the directory, had any knowledge of the various checks set up in the petition as fraudulent, and that they were charged to the account of other parties than those drawing them, or on whom they were drawn, except the clerks who charged them up to said account as stated, and there was evidence tending to show that they charged them up to such accounts by the direction of McKnight, the President, and except, further, R. E. Reutlinger, the Cashier and Teller of said Bank, knew of said checks when they came into said Bank, and was instructed to hold them as cash items by McKnight, but further than this he had no knowledge of them."

The evidence of R. H. Courtney and James S. Escott shows that the Bank was not closed nor was McKnight arrested for the embezzlement of any of the amounts charged in the petition, but that the arrest was made on a charge of making and causing to be made a false entry as to a $10,000 cash item, and also that none of these amounts were discovered until two or three weeks after the receiver was appointed—that it was not until then that the expert accountants *began* to discover any embezzlements—and then discovered them thereafter from *time to time*. (See Record, pages 33 to 35.)

No officer of the Bank, including the directors, except President McKnight, had any knowledge of these fraudulent transactions nor could any of them have discovered them by the exercise of diligence, by reason of the peculiar nature of said accounts to which they were charged—said accounts

being both debits and credits known only to McKnight and managed by him, for whisky and tobacco sold and expenses on same, and purchase thereof.

It is contended, however, that R. E. Reutlinger, the Cashier and Teller, and Adolph Reutlinger, the Vice-President, had notice of the $1,000 check of Edmunds, and that they and also Director Reisch had notice of the $2,000 Britt and Reeder note transaction, and the errors assigned by plaintiff in error relate principally to these transactions; there are others, however, that do not—all are given here as arranged in brief by counsel for plaintiff, to-wit:

1. In admitting as a sufficient notice of McKnight's defaults the letter of R. H. Courtney, receiver, written February 18, 1897, to the Fidelity & Deposit Company.

2. In excluding from the jury the petition filed by R. H. Courtney, receiver, against McKnight, on March 6, 1897, in the Jefferson Circuit Court, to recover the amount of three of McKnight's alleged defaults and embezzlements, also set out in the petition in this case against the Fidelity & Deposit Company.

3. In instructing the jury that the claim made on the Fidelity & Deposit Company by R. H. Courtney, receiver, on July 2, 1897, was early enough in time.

4. In excluding from the jury the letter of the Cashier written on May 29, 1896, to the President of the Fidelity & Deposit Company, and stating that all moneys handled by McKnight had been accounted for, and that he had performed his duties in an acceptable and satisfactory manner, and that he knew of no reason why the guarantee bond should not be continued.

5. In telling the jury that the knowledge of Rudolph Reutlinger, the Cashier, of the alleged defaults and embezzlements of J. M. McKnight was not the knowledge of the Bank, and that the jury could not find that the Bank knew of the defaults and embezzlements of said McKnight unless we showed the Board itself had knowledge.

6. In telling the jury that the knowledge which Adolph Reutlinger, who was Vice-President and a Director, had, or which Mr. Reisch, another Director, had of the alleged

defaults and embezzlements of McKnight was not the knowledge of the Bank; and that a knowledge of said McKnight's defaults and embezzlements could not be imputed to the Bank or release the surety under its contract, unless we could prove that the Board of Directors had such knowledge.

7. In telling the jury, first in the Fifth Instruction and later in the Eighth Instruction, when they asked whether the carelessness of the Directors in the management of the Bank released the surety, that the carelessness of the Directors in the management of the Bank was not a question for their consideration, and that it would not release the surety from liability on the bond.

These errors will be considered in the same order, except Nos. I and III, which will be considered together.

I.

"Notice of McKnight's Default."

III.

"Time in Which Itemized Claims to be Filed."

The German National Bank was, by order of the Comptroller, closed January 17, 1897, and its President, J. M. McKnight, was arrested; but this action was taken not by reason of any of the defalcations herein complained of, but for certain alleged false entries and reports. On January 22, 1897, R. H. Courtney was appointed receiver, and then experts Escott and Hayes began an examination of the books that continued several months—some four or five.

R. H. Courtney says, page 34 of the record, that these defalcations were not known to him until after *he began* the examination under the experts. So the experts did not begin until *after the receiver was appointed January 22d.*

James Escott, the expert, says, page 35 of record: "*We began to get these shortages about two or three weeks after the Bank was closed—they were discovered from time to time —I began to discover them within two weeks.*"

On February 18, 1897, R. H. Courtney, as receiver, gave plaintiff in error the following notice:

J. M. McKNIGHT, President. H. H. RADEMAKER, Vice-President. R. E. REUTLINGER, Cashier.

GERMAN NATIONAL BANK.

LOUISVILLE, KY., February 18, 1897.

To the Fidelity & Deposit Company of Maryland, Baltimore, Md.:

GENTLEMEN—Referring to the certificate No. 4043, issued from your security department guaranteeing the fidelity of Jacob M. McKnight, President of the German National Bank, under your bond to him, No. 5002, issued June 1, 1894, in favor of such Bank, we hereby notify you that said Jacob M. McKnight, as President, has been found in default to this Bank, and that you will be required to make an indemnity to me as receiver to the extent of said bond.

Yours truly,

R. H. COURTNEY,

Receiver German National Bank.

Then, according to this evidence, it is conclusively shown that this notice of default was given immediately or within a day or two of the first discovery of any of these defalcations—(counsel for plaintiff in error admitted that the notice was given). (Record, page 35.)

The bond provides—

> "That the Employer shall immediately give the Company notice in writing of the discovery of any default or loss hereunder, and shall file with the Company his or their claim hereunder, with full particulars thereof, as soon as practicable thereafter, and no claim which shall not be so filed by the Employer with the Company

within six months after the expiration or cancellation of this bond or within six months after the Employee shall have ceased to be in the Employer's service, shall be payable hereunder."

There are three conditions in this provision of the bond:

1. That immediate notice shall be given of any default or loss.

This is required for the purpose of terminating any further liability, as it is further provided in said bond:

> "That upon notification to the Company of any loss hereunder the Company's liability shall thereupon terminate as regards any subsequent act of the Employee."

No statement or itemized account is required to be given under this notice, but it is further provided that *after this notice has been given*—

2. That the claim shall be filed with full particulars *as soon as practicable thereafter.*

3. The time in which this itemized statement must be filed is limited to six months.

Still another provision of said bond is:

> "That no suit or proceeding at law or in equity shall be brought to recover any claim under this bond unless the same shall have been commenced within twelve months (365 days) from the date of the first notification by the Employer to the Company of any loss hereunder."

So it is quite certain that the first notice was to be given immediately, simply to cancel the bond, and was to be of a general nature, not specific, and then the itemized statement was to be furnished as soon *thereafter* as practicable—not later than six months—and suit commenced within twelve months from *first notice.*

On July 2, 1897, an itemized statement was filed by the receiver with plaintiff in error, of these defalcations. This must have been within a few days of the time when the examination by these experts was concluded.

So as far as the receiver is concerned he has complied literally with the terms and conditions of the "bond," both as to the first notice, the filing of the "full and particular account" and in bringing suit within the period of limitation.

It seems that counsel for plaintiff in error in their brief confound the time in which the first notice is to be given, and the time allowed to file itemized account or full and particular statement of loss. In the latter case the condition is to be complied with as soon as practicable after the first notice, but not later than six months thereafter.

It is insisted, however, that R. E. Reutlinger, the Cashier, Adolph Reutlinger, Vice-President, and Jacob Reisch, a Director, all had notice of the $1,000 draft of S. E. Edmunds of January 21, 1896, and the discounting the $2,000 Britt and Reeder note of date February 6, 1896, and that therefore this was notice to the Bank, and it should have immediately given notice thereof to plaintiff in error, and failing to do so said bond was released.

The evidence does not bear out the contention that these parties had any knowledge of the *fraudulent nature* of any of these transactions. The Cashier knew the check was drawn by Edmunds, and also that the Britt and Reeder note was discounted by direction of the President, and, in his presence, and he told his father, Adolph Reutlinger, who was not actively engaged in the Bank, of this just as he told him of all other transactions. Both of these parties say they had no knowledge of the nature of any of these transactions or for what the money was paid out, and there is no evidence in the case tending to show they had any such knowledge.

Jacob Reisch says that Adolph Reutlinger told him about the $2,000 Britt and Reeder note, and in an indefinite kind

of a way undertakes to say that he told him at some time that it was used in the *Todd race*, but it can plainly be seen from his examination—first saying that he *did not* and then stating he *did* tell him—that he is in doubt, and is confusing dates. Adolph Reutlinger says he did not know the nature of the transaction and did not tell Reisch as he states. Adolph Reutlinger says he could not learn whether this Britt and Reeder note was good or not, and did call it up before the Board at its meeting, but that McKnight, the President, stated that it was perfectly solvent and good, *that he knew it was*, and he would also undertake himself to see to it—he was the chief officer of the Bank. He had the right to discount paper. There were no grounds on which to suspect him, and even if a vague suspicion did rest in the minds of any of the Board, that was not sufficient to make notice to the plaintiff in error necessary; the case of American Surety Co. vs. Pauley, 170 U. S., 131, and American Surety Co. vs. Pauley, 170 U. S., 159, is believed to sustain the contention on these propositions.

But conceding that these parties received the information it is claimed, it is earnestly contended for the defendant in error that this was not such notice to the Bank as would require action:

1. Because the information or knowledge which it is charged that the Reutlingers and Reisch had is not such information or knowledge as under the terms of the bond became necessary to give notice, as the first section of the bond only required notice to be given upon the discovery of any *default or loss*.

The third section of the bond, where it speaks of the employer "condoning any act or default on the part of the employee which would give the employer the right to claim under said bond, and shall continue the employee in its service without written notification to the company," must necessarily refer to such *default or loss* referred to in the first

section, and can not relate to mere *irregularities* or *mistaken judgment*, and as McKnight, as President, had the right in all cases to discount paper and thereby become the sole judge as to the surety, terms, etc., and as in the matters mentioned he appeared before the said Board and assured them of the solvency of the parties, and assumed the responsibility even himself for the payment of said note, and as the opening of the Bank at night had been done in many instances in order to accommodate customers, while that was a little out of the order of things, it was not such information or knowledge as to authorize the officers of the Bank to give notice thereof; such notice is nothing short of charging a crime against the President, and certainly the information did not justify any such charge.

2. Because notice to those parties, as individuals, and not while acting officially for the Bank, will not be imputed to it.

3. It is not claimed that any notice was given to the Directors as a body, except as to the $2,000 Britt and Reeder note, and even as to this note *Reisch does not pretend that he told the Board for what the money was given.*

The Reutlingers only knew that the Edmunds check had been drawn; Edmunds was a partner of McKnight, and had an account and was doing business with the Bank. McKnight as President had the right to order said check paid, and there was nothing unusual in the transaction. The Cashier knew of some of the other checks cashed by order of McKnight, but the same is true as to these.

As to the Britt and Reeder note the Bank was kept open by request of McKnight beyond the usual hour—and the evidence shows this frequently occurred. The note, on its face, did not bear interest to maturity, but this is frequently the case with such paper, discount being deducted or interest added in the note; and when the attention of the Directors was called to this note, there appeared no indication of any embezzlement of the Bank's money, but on the contrary the President, who had the right to discount paper, assured them that

it was all right, and he seems to have satisfied the Board—he was their chief officer—they had never suspicioned him of any wrong-doing. The notice to them was not sufficient to make the most cautious suspect anything wrong, even irregular.

The question of this notice will be again considered under the other errors assigned.

It is further contended for plaintiff in error that the charge given by the Court as to this notice, and which is designated as No. 2 in the bill of exceptions, and is as follows:

> "In considering that clause of the contract between these parties, I do not think the word 'immediate' should be given such construction as that it would mean instantly, but I believe that it conforms with the views of the Supreme Court and the authorities generally to tell you that it means that it was the duty of the plaintiff in this case to give, as soon as reasonably practicable and with promptness, notice of the discovery of any default. It did not mean that as soon as one was suspected that notice should be given, but if you believe from the evidence that, within a reasonable time after, the receiver in this case—and you must remember that he is the receiver merely, and that he knew nothing about the management of this Bank, nothing of its affairs, until he was appointed—if you believe that within a reasonable time after he discovered, actually discovered, a default he gave the notice of the 18th day of February, 1897, you are at liberty to infer that the part of the obligation of this bond has been performed"—

Is erroneous, because it excludes from the consideration of the jury the Edmunds and Britt and Reeder transactions. Only such parts of the charge as are excepted to are copied in the record, and this part of the charge here referred to related only to these particular matters of Reutlinger and Reisch. Charge No. 5, copied in said bill, relates to the Britt and Reeder and other similar transactions and cures this seeming error. It is as follows:

> "Now I suppose in this case if the Bank had known that McKnight was making these drafts for these various

fraudulent purposes, such as buying up councilmen, buying up aldermen, paying his own private personal debts—if the Bank had known that and consented to it, there would not have been a fraudulent act by McKnight for which the Bank could recover against this Company, but if you believe from the evidence that the Bank did not know of the fraudulent purposes, then that changes the result."

II.

"Petition in Courtney vs. McKnight was competent evidence."

This petition does not show upon its face the nature of the indebtedness sued for therein or that it had any connection whatever with or was a part of any of these defalcations. The Court, it is to be supposed from date and amount, did assume that the item of $3,736 was one of these amounts embezzled. So it could not be competent unless something more was shown outside of the petition.

This petition was filed on March 6, 1897, in the Jefferson Circuit Court; this was some twenty days after the *first notice*, that is, of February 18, 1897, had been given. So it will not be contended that it illustrates anything whatever as to this notice or that it was competent evidence bearing in any sense upon this notice.

The only purpose the introduction of this suit could serve was to show that the receiver had notice of any defalcations therein included, on March 6, 1896—some three months before the *claim against the Company with full particulars thereof was filed.* If this suit shows anything it is that the receiver did not then know the full particulars of his claim against the Company under this bond. He was not required to make out his claim item by item as it was discovered, but was to make out the whole claim, with full particulars, as soon as practicable, not later than six months after first notice which cancelled the bond.

Giving the full force to this that is claimed by plaintiff in error, it would simply show that the receiver had then discovered three items and no more. The examination of the experts had not been completed—and certainly the six months' time limit in which a full and particular claim must be filed had not expired.

The statements of the petition could have been admitted as true and as showing all facts claimed, yet it would not have prevented a recovery, as such evidence under the facts of this case was not material.

Plaintiff in error was not prejudiced by the exclusion of this evidence.

IV.

Cashier's Letter of May 15th Bound the Bank.

It is contended that the refusal of the Court to admit this letter was an error and prejudicial to the rights of plaintiff in error.

This letter was written to the Company by the Cashier of the German National Bank and is in response to one written by said Company to the said Bank, and the order and proceedings in reference thereto are as follows, to-wit:

> "And thereupon the defendant offered in evidence a letter signed by R. E. Reutlinger, Cashier, and addressed to the defendant, the Fidelity & Deposit Company of Maryland, as follows:

Security Department. No. 5002. Bond Division.

FIDELITY & DEPOSIT COMPANY OF MARYLAND,
Home Office, Baltimore, Maryland.

BALTIMORE, May 15, 1896.

To German National Bank, Louisville, Ky.:

DEAR SIR—We hereby notify you that Bond No. 5002, for $10,000, issued by this Company on behalf of Jacob M. McKnight, in your employ as President, will expire on the first day of June next.

The premium, $40, should be paid on or before the date of expiration, otherwise the bond will lapse. Kindly have the certificate below filled in and signed and forward, with remittance for premium, to Jos. S. Odiorne, General Agent, when the renewal receipt will be sent you.

Yours respectfully,
EDWIN WARFIELD,
President.

To Fidelity & Deposit Company of Maryland:

This is to certify, That on the day of 189 , the books and accounts of Mr. J. M. McKnight, is President, in our employ, as has no books and accounts were examined by us, and we found them correct in every respect and all moneys handled by him accounted for.

He has performed his duties in an acceptable and satisfactory manner, and we know of no reason why the guarantee bond should not be continued.

His salary is now $4,500, and he is employed as President.

(Signature) R. E. REUTLINGER, *Cashier*,
Employer.

Dated at Louisville, Ky., May 29, 1896.

To Employer—Notice of Expiration:

"And it not appearing that there had been special authority from the Board of Directors of the said Bank, authorizing or directing the said Cashier to write such communication, and the Court being of opinion that the Cashier had no such power by reason of his office, the same was not binding upon the said Bank, and excluded the same as evidence, to which the defendant excepted at the time, and still excepts. After the Court had refused the defendant permission to read to the jury the letter signed by the Cashier and addressed by him to the defendant, and dated May 29, 1896, and relative to the renewal of the said McKnight's bond, the counsel for the defendant asked the said Cashier the following questions:"

No attempt was made to show that any other officer of said Bank had any knowledge of the writing or sending of said letter.

In American Surety Company against Pauley No. 1, 170 U. S., 160 (986), the same defense was made as herein, except the President of the Bank wrote the letter to obtain bond for Cashier; in all other respects the facts are almost identical—and after reviewing a number of cases the Court says:

"Without stopping to consider whether each of the above cases was correctly decided, it may be observed that those relating to sureties in bonds given to corporations arose directly between the sureties and corporations represented by their Boards of Directors or by some of their officers acting within the authority conferred upon them; and those relating to the liability of a principal by reason of the acts or representations of his agent arose out of the agent's acts or declarations in the course of the business intrusted to him.

"None of the cases cited embrace the present one. In the first place, the procuring of a bond for O'Brien, in order that he might become qualified to act as Cashier, was no part of the business of the Bank, nor within the scope of any duty imposed upon Collins as President of the Bank. It was the business of O'Brien to obtain and present an acceptable bond. And it was for the Bank, by its constituted authorities, to accept or reject the bond so presented. The Bank did not authorize Collins to give, nor was it aware that he gave, nor was he entitled by virtue of his office as President to sign any certificate as to the efficiency, fidelity or integrity of O'Brien. No relations existed between the Bank and the Surety Company until O'Brien presented to the former the bond in suit. What therefore Collins assumed in his capacity as President to certify as to O'Brien's fidelity or integrity, was not in the course of the business of the Bank nor within any authority he possessed. He could not create such authority by simply assuming to have it. The Circuit Court of Appeals, speaking by Judge Lacombe, well said that there were many acts which the President of a Bank may do without express authority of the Board of Directors, in some cases because the usage of the particular Bank impliedly authorized them, in other

cases because such acts were fairly within the ordinary routine of his business as President, but that the making of a statement as to the honesty and fidelity of an employe for the benefit of the employe, and to enable the latter to obtain a bond insuring his fidelity was no part of the ordinary routine business of a Bank president, and there was nothing to show that by any usage of this particular Bank such function was committed to its President.

"It must therefore be taken, as between the Bank and the Company, that the former can not be deemed, merely by reason of Collins' relation to it, to have had constructive notice that he, as President, gave the certificate in question.

"The presumption that the agent informed his principal of that which his duty and the interests of his principal required him to communicate does not arise where the agent acts or makes declarations not in execution of any duty that he owes to the principal, nor within any authority possessed by him, but to subserve simply his own personal ends or to communicate some fraud against the principal. In such cases the principal is not bound by the acts or declarations of the agent unless it be proved that he had at the time actual notice of them, or having received notice of them, failed to disavow what was assumed to be said and done in his behalf."

A great number of authorities are cited to show that the Cashier is the agent of the Bank for the purpose of writing and receiving letters, and that an action of deceit may be maintained against a bank for the fraudulent representations of its Cashier, but in all of these text-books quoted and cases cited a condition precedent is always stated; that is, *when the Cashier acts within the scope of his authority*—and as said in the American Surety Company vs. Pauley, above quoted:

"In the first place, a procuring of a bond for O'Brien, in order that he might become qualified to act as Cashier, was no part of the business of the Bank, nor within the scope of any duty imposed upon Collins as President of the Bank."

Again:

> "No relation existed between the bank and the Surety Company until O'Brien presented to the former the bond in suit; what therefore Collins assumed in his capacity as President to certify as to O'Brien's fidelity or integrity, was not in the course of the business of the bank, nor within any authority he possessed."

If the Cashier acts as agent, such acts must be within the scope of his authority in the discharge of the *business of the bank*, and, as it was not the business of the Bank to procure McKnight's bond, the Cashier could not bind the Bank by his acts unless authorized specially or by usage, or unless the acts have been ratified.

No authority or usage is attempted to be shown; it is contended, however, that this act was ratified by the Bank continuing the bond from June 1, 1896, to June 1, 1897.

The original bond was issued June 1, 1894, and it had been once renewed before this letter was written, which bears date May 29, 1896; the last renewal was made June 1, 1896. It is not pretended that the Bank or any of its officers —except the Cashier—ever knew that this letter was written —the continuance of the bond did not ratify that act, as the existence of the bond gave no notice of such a letter.

It is stated that the guarantee was gotten by the Bank from the Company, and that this could have been shown had the Court permitted the examination to proceed.

There is no evidence tending to show that the Bank had anything whatever to do in procuring this bond, and, as to the Court preventing the examination on said point, attention is called to the Record, page 54, where the entire examination is found, and, being brief, same is given here, to-wit:

"I would like to ask the witness this question: Did not the Bank pay for the bond of the President?"

A. "I could not answer that; I don't know it."

Q. "Did not the Bank pay for your bond as Cashier?"

A. "I think they did; yes, sir."

Q. "Were not all these bond matters discussed by the Board of Directors and the party that was to give bond, and was not the party that was to give bond selected by the Board of Directors?"

Objected to by counsel for plaintiff; objection sustained, to which the defendant excepted. Then counsel for the defendant asked the witness this question:

"Did you not know why you were signing any paper of this sort at all?"

A. "Yes, sir; I knew when that letter came; I knew it, yes, sir; not before that, though."

Q. "You knew the bond had to be renewed, then, and you wrote the letter to the Company on that account?"

A. "I signed that paper; yes, sir."

Objected to by counsel for plaintiff, because the paper had been excluded, and is immaterial.

By the Court: "Yes, that is an improper question;" to which ruling of the Court the defendant excepted.

It is respectfully submitted that this investigation and the ruling of the Court thereon did not prejudice the rights of plaintiff in error.

V.

The Cashier's knowledge of McKnight's default was the knowledge of the Bank.

VI.

Knowledge of Directors Reutlinger and Reisch was Knowledge of the Bank.

As to these propositions contended for by plaintiff in error it is submitted that in speaking of the alleged fraudulent transaction between McKnight and Reeder and Britt respecting the $2,000 note, and which was one of the earliest, if not the earliest, in point of time of all those alleged, the Court charged the jury (Rec., p. 51), that if they believed from the evidence that this transaction and its fraudulent purpose was known to and condoned by the Bank before the other transactions occurred, then the defendant was not liable. But the Court, in stating the converse of the proposition, charged the jury that if they believed that the Bank did not know it, that it was the fraudulent act of McKnight alone, not participated in by the Bank, and the defendant was not liable, explaining in parenthesis that when the Court said Bank he meant Bank, and did not mean an individual director merely.

It is insisted that the Court should have charged that the knowledge of Adolph Reutlinger, the Vice-President, and a director, should be imputed to the Bank, or else that of Reisch, to whom it was communicated, should be. What little knowledge they had is stated on page 46 of the record, and by no means shows that either of them knew of any fraudulent intention on McKnight's part—the only knowledge that was important in this connection, as clearly appears from the charge. Mere knowledge that the President had made a discount at an unusual hour was nothing to excite suspicion, and when all either Reutlinger or Reisch knew was laid before the directors, McKnight's explanation was accepted as natural and satisfactory. His real fraudulent political purpose was never made known.

Reutlinger being Vice-President added nothing to the fact of his being a director, as he was not a manager of the Bank. This part of the charge was, of course, specially limited to and based upon the facts proved concerning the knowledge of Adolph Reutlinger, who had mentioned to director Reisch the facts which had been told to him. This common knowledge, however, was limited to the fact that the Reeder and Britt note had been discounted at an unusual hour, and in no way embraced any knowledge of the fraudulent purposes of the President of the Bank.

On page 37 of the record it is shown that this knowledge on the subject of what had occurred sometime before was communicated to Reutlinger at his home at night after business hours by his son. He told Reisch of it. The Reeder and Britt transaction was with the President, the chief executive and head of the Bank, and not with the Vice-President or either of the directors. It might have been unusual, but it was within the power of McKnight, the President, and was therefore nothing to excite suspicion. The information certainly did not come to Adolph Reutlinger at his office, nor anywhere in the bank, nor while he was at his place of business, and knowledge coming this way to a single director of a transaction within the President's powers is clearly not the knowledge of the Bank, and particularly not its knowledge of anything wrong of which the director had really no knowledge. The same observations apply to whatever knowledge Reisch had. The authorities leave no doubt that, upon the facts of this case, the Court below was entirely correct in this part of the charge. It is only necessary to refer the Court to the latest edition of Cook on Corporations, Vol. 2, Sec 727. And it can not be too strongly emphasized that all this information of these two directors was promptly laid before the full board, and by it approved, but as McKnight concealed his real purpose when making his explanation, the Bank knew nothing of it, and the defendant

was in no way prejudiced by this part of the charge, even if it had been technically incorrect.

In second volume of Cook on Corporations, 4th edition, Section 727, page 1564, it is said:

> "In general the test turns on whether the corporation agent received the knowledge in the regular course of business. Knowledge by an officer, derived as an individual and not while acting officially for the corporation, can not operate to its prejudice, and will not be imputed to it."

In the case of C. N. Bank vs. Clark *et al.*, 139 New York Reports, pages 312, 313 and 314, it is said:

> "In order to obviate the effect of the rule we have discussed, the appellants proved that Winslow, a director of the payee company, was also a director in the plaintiff bank at the time when the note was discounted, and it was argued that the knowledge chargeable to him as director of the former company was imputable to the plaintiff. But that fact is insufficient to charge the plaintiff with knowledge of the character of the obligation. He in no sense represented or acted for the bank in the transaction, and whatever his knowledge respecting the note it will not be imputable to the bank. (National Bank vs. Norton, 1 Hill, 572, 578; Mayor, etc., vs. Tenth National Bank, 111 N. Y., 446, 457; Farmers, etc., Bank vs. Payne, 25 Conn., 444.) He was but one of the plaintiff's directors who could only act as a board. (National Bank vs. Norton, *supra.*) If he knew the fact that these were not individual but corporate notes, we can not presume that he communicated that knowledge to the board. An officer's knowledge, derived as an individual and not while acting officially for the bank, can not operate to the prejudice of the latter. (Bank of U. S. vs. Davis, 2 Hill, 451.) The knowledge with which the bank, as his principal, would be deemed chargeable so as to effect it would be where as one of the Board of Directors and participating in the discount of the paper, he had acted affirmatively or fraudulently with respect to it; as in the case of Bank

vs. Davis (*supra*), by a fraudulent perversion of the bills from the object for which drawn; or as in Holden vs. New York & Erie Bank (72 N. Y., 286), where the President of the bank, who represented it in all the transactions, was engaged in a fraudulent scheme of conversion. It was said in the latter case that the knowledge of the President, as an individual or as an executor, was not imputable to the bank merely because he was the President, but because, when it acted through him as President in any transaction where the knowledge was material and applicable, it acted through an agent.

"The rule may be stated, generally, to be that where a director or an officer has knowledge of material facts respecting a proposed transaction which his relations to it as representing the bank have given him, then, as it becomes his official duty to communicate that knowledge to the bank, he will be presumed to have done so, and his knowledge will then be imputed to the bank. But no such duty can be deemed to have existed in this case, where the appellants have made and delivered a promissory note, purporting to be their individual promise. If one of the plaintiff's officers did have knowledge, whether individually or as a director of the Clark & Chaplin Company is not material, that the paper was made and intended as a corporate note, his failure to so state to the bank could not prejudice it. It was in no sense incumbent upon him, assuming that he actually participated in the discount (a fact not shown), to explain that the note was the obligation of the Ridgewood Company and not of the persons who appeared as its makers. He was under no duty to these persons to explain their acts, and the law would not imply any. At most, it would be merely a case of knowledge, acquired by a director, of facts not material to the transaction of discount by the plaintiff, and which he was under no obligation to communicate."

In American Surety Co. vs. Pauley, 170 U. S., 153 (985), it is said:

"Without stopping to consider whether each of the above cases was correctly decided, it may be observed

that those relating to sureties in bonds given to corporations arose directly between the sureties and corporations represented by their boards of directors or by some of their officers acting within the authority conferred upon them; and that those relating to the liability of a principal by reason of the acts or representations of his agent arose out of the agent's acts or declarations in the course of the business intrusted to him."

Neither Adolph Reutlinger nor Reisch received any information while acting for the Bank or in the regular course of business, and consequently what they did learn was no notice to the Bank.

On the trial of this case, plaintiff in error did not introduce any evidence, and there was no conflict whatever in the evidence heard as to the manner and circumstances under which Reisch and Reutlinger received their information. Then, as it is clearly shown that they received their information as individuals, and not while acting for the Bank, as a matter of law it was no notice to the Bank, but in any event their information if so received as to be imputed to the Bank, still it was not sufficient or of such a nature as to give the Bank or its officers notice of any fraudulent act of McKnight as against the Bank or which in any way come under the provisions of bond of guarantee of fidelity.

Both these parties knew the Britt and Reeder note had been discounted by McKnight, the President of the Bank—they knew it had been done at an unusual hour, but the Bank had been kept open late on other occasions. Reutlinger says he did not know for which purpose the money was used. Reisch thinks he did tell him it was to be used in the Todd race—Mayor's race. Reisch is evidently mistaken, but take it that they knew the money was to be used in said race—if the note was good, this could not affect the Bank, or if the note was not good; yet McKnight had the right to discount paper for the Bank, and if he believed it good or *if he convinced the Board of Directors that he acted in good faith*,

then although the parties to said note may have been insolvent and this fact known at the time to McKnight, still he was acting in his own interest—fraudulently—these facts shown are not sufficient to put the Bank on notice of such fraud.

On page 37 of the record it is stated:

"As to the $2,000 Britt and Reeder note, there was also evidence tending to show that R. E. Reutlinger was required to stay at the Bank until after banking hours, and was directed by McKnight to, and did lay out the $2,000 on said note to said parties, but that further than this he had no knowledge thereof.

"There was also evidence tending further to show that said R. E. Reutlinger informed his father, Adolph Reutlinger, Vice-President, of the payment of this $2,000 that night, and that said Adolph Reutlinger made inquiry of McKnight to explain the transaction. That thereupon McKnight told him that said parties were good and solvent, and the note was regularly discounted and all right, and that if required Gaulbert or Whallen would sign same with them, and that he, McKnight, would guarantee the payment thereof; that the parties were obliged to have the money that night, and he so kept the Bank open to let them have it.

"There was evidence tending further to show that said Adolph Reutlinger then went before the directory and told them what McKnight had said in regard to this note, and said to them that he had made some investigation and could not find that these parties had any property; that he was unable to say whether or not they were good; and that thereupon McKnight came before said directory and made the same statement to them that he had made to Adolph Reutlinger, assuring them that the note was good, and that said directors believed and relied on his statement, and so passed the note; that there was no other evidence tending to show any further knowledge of said note, or its true character, by the other officers or any of the directors of the Bank other than as herein stated, except in the testimony of

Jacob Reisch, one of the directors, that some short time after the execution of said note Adolph Reutlinger told him what he had learned thereof as herein stated, and further he says that said Reutlinger told him then that the money was used in the Mayor's race. This latter statement Adolph Reutlinger denied in his evidence."

Thus it is shown that, McKnight having the authority, as President, to discount this note, and being questioned as to the solvency of the parties, etc., convinced the board by his statement—which they had the right to rely on—that the transaction was all right and the note perfectly good.

In the case of the United States against Britton, 108 U. S., 199 (702), it is said:

"One branch of the business of a banking association is the discounting and negotiation of promissory notes, and this is to be done by its Board of Directors or duly authorized officers or agents. (Sec. 5136, Revised Statutes.) There is no provision of the Statute which forbids the discounting of a note not well secured, or both the maker and indorser of which are insolvent. It is within the discretion of the directors or the officers or agents lawfully appointed by them to discount such a note if they see fit, and it might under certain circumstances, tend to the advantage of the association. This count does not charge that the note of the defendant was discounted at his instance, without the authority of the Board of Directors. On the contrary, the charge is that he caused and procured it to be discounted. This implies that it was done by the directors or other duly authorized officers or agents. It is not alleged that the discount was procured by any fraudulent means. From all that appears the Board of Directors, or the officer or agent by whom the note was discounted, may upon knowledge of all the facts in the utmost good faith and for the advantage of the association, have decided to discount the note. The discount may have turned out to be a benefit to the association, for there is no averment that the note was not paid at maturity or that the association suffered any loss by reason of its discount."

What is herein said in reference to the knowledge of Reisch and Reutlinger, is equally applicable to that of R. E. Reutlinger, the Cashier, except perhaps the Cashier may have received some of his information while acting officially for the Bank, but he received it from the chief officer, the President, and it was all in regard to acts and duties that that officer had a right to and was performing, and consequently gave no notice of any fraud to the Cashier.

Reutlinger, the Cashier, did know of these various checks given by McKnight, and that by his instructions they were held for awhile and then charged up to either "The Louisville Deposit Bank Collateral Account," "The E. G. Williams, Special," or "The S. E. Edmunds & Co. Account," as McKnight directed; he also knew that "The Louisville Deposit Bank Account," and "The E. G. Williams, Special," represented the collaterals amounting to some $200,000 of the Louisville Deposit Bank held by the German National Bank, and being managed, collected and disposed of by McKnight as President, and that he gave many checks chargeable to said account, and the Cashier did not know or have any means of knowing for what they were given. Said Cashier also knew the S. E. Edmunds & Co. Account was the account of the tobacco firm composed of Edmunds and McKnight; that they bought and sold a great deal of tobacco—gave many checks and made many deposits. He also knew McKnight, as President, was receiving from said Bank a salary of $4,500 per annum. He knew that the $1,000 check of Edmunds was drawn in the usual course of business and ordered paid by the President—and that the Britt and Reeder note was regularly discounted by order of the President. He had no knowledge of any fraud in any of these transactions, and neither the facts of such transaction nor any attending circumstances gave him such notice or even caused him to suspicion anything wrong. McKnight explained to him why it was he wanted the Bank left open beyond usual hours, and this has been done on other occasions to attend to business matters.

So if it be contended that notice to a cashier while in the discharge of official duties of the bank is notice to the bank —still if all of this information and knowledge charged to this Cashier had been imparted to the Bank, it would not have given the Bank notice of any fraud upon the part of McKnight, nor would it have been such knowledge or information as under the conditions of the "bond" the defendant in error was required to give the Guarantee Company notice of.

In that part of the charge excepted to, marked Instruction No. 6, found on the 60th page of the record, the Court said:

> "I do not think that the knowledge of a cashier of a bank, speaking generally, is the knowledge of the bank as to any matter that does not come within the customary or ordinary duties of a cashier or those which have been specially imposed upon him by the action of the bank. I do not think Mr. R. E. Reutlinger in this case, in respect to any matter which he knew or could do, represented the Bank, if it was outside of his ordinary duties; and I do not recall anything that he knew, so far as the proof shows, that would in anywise affect the liability of the defendant in this case."

It is believed that the law is correctly given in this case, but if it be that it is too broadly stated when speaking generally as to the knowledge of the Cashier being the knowledge of the Bank, under the facts proven in this case at bar, plaintiff in error has not been prejudiced by this technical error. The Court correctly says that the Cashier does not state anything *in this case* that would in anywise *affect the liability of defendant.*

It is not deemed necessary—considering the position held by McKnight, his authority, the salary paid him, and the entire failure of the proof in this case to show any fraudulent intent on his part in overdrawing his account—to discuss the

proposition as to whether or not the simple fact of such overdraft evinced such fraud as to make it the duty of the Bank to notify the Guarantee Company.

In that part of the charge No. 7, in the record, page 61, it is said:

> "The testimony in respect to the knowledge of the Bank of the purpose for which the $2,000 was taken out at half-past six or seven in the evening, I say the knowledge of the Bank respecting that must be proven, in my judgment, in such a way as to satisfy the jury that the Bank, as distinguished from any mere director of it, knew of that transaction. The elder Reutlinger tells you that he did not know the purpose for which that money was taken out of the bank. He knew it was taken out after the ordinary banking hours, being taken out at seven or half-past seven o'clock. The bank sometimes for special reasons he named had been kept open. Now, there is no inference to be drawn against R. E. Reutlinger because he at the instance of the president kept open the bank for the purpose of, as he said, introducing certain friends at a late hour. *If Mr. R. E. Reutlinger had known of the fraudulent purpose of McKnight, or had participated in it, that might have been a different thing; but he says he did not.* He did not know what this money was paid out for. On the demands of the President he paid the money, on the discount arranged by the President, and that is all he knew about it. The only conflict of evidence in the case is that Mr. Reisch says that within a short time, a day or two afterwards, he was informed by the elder Reutlinger that this money was used for this political or corrupt purpose. It is for you to reconcile this statement. If you believe from the evidence that the Bank did know of this fraudulent purpose, and that this default of McKnight's, this fraudulent act of McKnights in getting this $2,000, was known to the Bank at the time, then I instruct you that all of the liability of the defendant in this case would cease then, that being the earliest, or one of the earliest, if not the earliest of all these transactions. If you believe from the evidence that this transaction

was known and condoned by the Bank at the time, before these other transactions occurred, then the defendant in this case is not liable. But if you believe on the contrary that the Bank did not know it, that it was the fraudulent act of McKnight alone, not participated in by the Bank—when I say the Bank I mean the Bank, I do not mean any individual director—then the defendant is liable."

This shows clearly that the Court intended to and did say to the jury that as the Cashier denied *any knowledge of fraud upon the part* of McKnight, and as there was no evidence in the case either from the transactions or the surrounding circumstances tending to show any such knowledge or any evidence from any other witness tending to show that the Cashier had knowledge of any fraudulent act on the part of McKnight, that the knowledge he did have of the transaction was not sufficient in any event to give the Bank such notice of fraud as to require action on its part.

In charge No. 5, record, page 58, it is said:

"What is due or customary supervision is something that has not been made very clear by the evidence in making out this defense. I don't know that it has been made clear to the jury any more than it has to the Court as to what is the customary supervision that is meant, or what is the due supervision that is meant. Possibly it may mean, and may be fairly considered to mean, a reasonable vigilance upon the part of the bank to prevent defaults. Now what is meant by that word default in this connection? I suppose that it may fairly be said that it means that there shall be observed due and customary supervision over the employe for the prevention of fraudulent acts. I suppose it is just to say that this word default means the violation of this contract or the doing of such an act as could be brought fairly within the provisions of this bond. That is to say, the word default here would mean precisely what the previous part of the bond meant when it said fraudulent acts

of McKnight. So that this obligation that the Bank assumed here was to use due and customary supervision over the employe for the prevention of his committing fraudulent acts. Now it is for you to say whether there is no satisfactory proof upon that subject, whether there was due and customary supervision to prevent McKnight from perpetrating these frauds."

As appears by the record, page 62, the following proceedings were had, viz.:

"During its consideration of this case the jury asked further instructions of the Court, and the jury being brought into open Court in the presence of counsel for both sides, the following proceedings were had:

"By the Court: The jury have addressed to the Court, in writing, this inquiry:

"'If the jury agree that the directors of the Bank were careless in the management of the Bank, shall the jury find for the defendant?'

"'Gentlemen of the jury, no such issue as that stated in this question was presented. The mere question of whether or not the directors generally were careless in their management of the Bank is not a question for your consideration, nor would it exempt the defendant from the obligation imposed by the bond sued on. You have already been instructed as to the meaning and effect of the condition of the bond as to due and customary supervision and outside of that there is no provision as to carelessness.'"

As shown by charge No. 5 the proposition as to due and customary supervision for the prevention of fraud had been submitted to the jury fully and completely. Now they ask as to carelessness in the management of the Bank—which is much broader than the conditions of the bond. They are referred to the former instruction—which was specific in its

nature and gave the law governing this particular case, which was all that was proper or necessary.

While the petition alleged that there had been default on the part of McKnight to the amount of eighteen thousand seven hundred and forty-two dollars and seventy-four cents ($18,742.74), made up of eleven items, set forth in detail on the fourth page of this brief; in considering these matters, it must be borne in mind that, as conceded by the attorney for the plaintiff in error in his brief, and as shown by the full instruction given in the case (which is not, however, copied in full, as shown by the record of this case), that of these eleven items the following five were abandoned, viz.:

June 11, 1894, ...	$252.09
April 6, 1895, ...	4,400.00
Sundry items, ...	443.15
November 26, 1896, . .	2,627.94
March 19, 1895, ...	1,000.00

These items were abandoned, because it was conceded by both plaintiff and defendant that upon examination they were found not to be such transactions as come under said bond, or such as could in any wise entitle plaintiff to recover therefor on said bond, and that in addition to this, as to these items, no irregular action or fraudulent purpose was shown on the part of said President, so the inquiry upon the trial of this case and the only matters at issue were as to the following items:

January 21, 1896,	Edmunds note,	$1,000.00
January 21, 1896,	Sachs check,	1,253.00
February 6, 1896,	Britt & Reeder note,	2,000.00
Feb. or March, 1896,	Sachs check,	1,650.00
June 8, 1896,	Union Nat'l Bnk check,	3,736.60
June 4, 1897,	Union Nat'l Bnk check,	379.96

As to these two Sachs checks and the two Union National Bank checks, it is not claimed, either in evidence or by the pleadings, that the Bank or any of its officers had any notice

of any fraud involved in such transactions, except it is claimed that the Cashier held these checks for some short while before charging them up, but the record also shows that these checks were given by McKnight to these parties, and were paid through the Clearing House, and therefore not by the Cashier, and that when the Clearing House slips came in, by instruction of McKnight, they were held for some short while. But the evidence also shows that they were afterward charged to the Williams, special, account, to the Louisville Deposit Collateral account and to the Edmunds & Co. account, all of which accounts were under the special management and charge of McKnight, the first two being accounts for whisky sold and expenses therefor, and the third being a similar account in regard to tobacco; and the fact of holding these matters could in no wise constitute an irregularity or create even a suspicion of anything wrong, as they did not show upon their face for what they were given, and McKnight in the proper handling of this whisky and tobacco was from day to day paying out and receiving hundreds of dollars, and said accounts were kept under his special directions and the amounts charged to same as he directed, and it was thus owing to the size of these accounts, the number of transactions involved therein, they representing in the neighborhood of some two hundred thousand dollars, that McKnight was enabled to conceal his fraud to that extent, that it took even the expert examiners some four or five months to pick out these items.

As to the Edmunds note. He was the party who had charge of this tobacco represented by this Edmunds & Co. account, and was daily drawing drafts and paying in money on said account, and even if the Cashier had known, which he says he did not, that Edmunds intended to use this one thousand dollars in an election fraud, it was not such information as would show a default or loss under the bond.

As to the two thousand dollar Britt and Reeder note, this appeared regularly upon the books as a discounted note, and

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the fact that the Bank was open after banking hours in order to permit the money to be withdrawn was nothing unusual with that Bank.

It is therefore respectfully submitted that the evidence in this case does not in any particular sustain the defense herein.

Since the decision in this case, this honorable Court, on the 6th of January, 1902, rendered an opinion in the Guaranty Company of North America, Petitioner, vs. Mechanics Savings Bank & Trust Company, etc., and it is contended that the rulings therein are applicable to the case at bar.

The evidence in this case at bar is not of the nature or strength of that in the Guaranty case; besides the bonds in the two cases are not alike.

SUMMARY.

For defendant in error it is contended:

That the first notice, that is, the notice of defalcation, was required only to be general in its nature, and Instruction No. 2, page 58 of the record, correctly states the law, as applied to the facts of this case.

That the second notice or the full and particular statement of loss is required to be given as soon as praticable—not later than six months from the first notice. That this statement was furnished as soon as the experts' examination was completed and within six months and the law governing same was correctly given in Instruction No. 3.

That the Court properly excluded by Instruction No. 1 the consideration as evidence the suit of Courtney, etc., vs. McKnight in State Court.

That the Court properly excluded as evidence the letter of the Cashier of date May 29, 1896, as he had no authority to write same and the Bank had no notice thereof.

That the knowledge of the acts of McKnight possessed by the Cashier was not notice to the Bank of any fraud on the part of McKnight; neither the acts nor any knowledge the Cashier had thereof showed any fraud. Admitting the knowledge shown by the evidence, it presented no defense to a recovery; besides it was no knowledge in regard to matters over which the Cashier had control, but related to the acts and duties of the President alone in discounting paper and ordering checks paid.

That the knowledge possessed by Reisch and Reutlinger was not sufficient to make out a defense. That they did not receive it in their official capacity but as individuals, and, therefore, first, it is not sufficient if admitted; second, it is not so obtained as to impute notice to the Bank.

That Instruction No. 5 gives the law correctly as to what constituted due and customary supervision to prevent fraud, and it was proper in the Court to refer the jury to same in answer to their inquiry.

Under the evidence in this case it is respectfully submitted that no error has been committed prejudicial to the rights of plaintiff in error.

W. M. SMITH,

Attorney for Defendant in Error.

Supreme Court of the United States.

No. 178.—October Term, 1901.

The Fidelity and Deposit Company of Maryland, Petitioner, vs. R. H. Courtney, Receiver, &c. | On writ of certiorari to the United States Court of Appeals for the Sixth Circuit.

[June 2, 1902.]

The action below was brought, on February 5, 1898, by Courtney, as receiver of the German National Bank of Louisville, appointed by the Comptroller of the Currency on January 22, 1897, four days after the closing of the bank. Recovery was sought upon a bond of indemnity for ten thousand dollars and renewals thereof, taking effect respectively on June 1, 1894, June 1, 1895, and June 1, 1896. The condition of the bond was to hold the bank harmless against any loss which it might sustain by reason of any fraud committed by Jacob M. McKnight, originally as vice president and later as president of the bank. The sum of $18,742.74 was alleged to have been dishonestly and fraudulently embezzled, and misapplied out of the funds of the bank from July 1, 1894, to January 4, 1897, by McKnight, either as vice president or president, and a statement of the items was embodied in the petition. Due proof of the claim was averred to have been made on July 2, 1897. By answer and amendments thereto the defendant took issue as to the happening of each of the alleged defaults; it averred that McKnight, prior to January 21, 1896, had indulged in speculations in whisky and tobacco and in disreputable and unlawful habits and pursuits; it further averred that the cashier and teller (one and the same individual), or the vice president of the bank, who became such when McKnight became the president, or the directors thereof, at or about the time of the happening of the defaults, had knowledge of the same, and that the bank condoned the defaults of McKnight for which recovery was sought. In effect, also, it was alleged that there had been a violation of each of the other conditions and stipulations of the bond. The amended answer concluded with the following averment:

"When said bond of June 1, 1894, given by defendant to said bank for the fidelity of said McKnight, as set out in the petition, was renewed for another year on June 1, 1895, to cover the period from that date to June 1, 1896, and was again renewed and continued on June 1, 1896, to cover the period from that date to June 1, 1897, said bank, through an officer other than said McKnight, represented and asserted and certified, with the knowledge of the directors of the said bank, that the books and

accounts of said McKnight had been examined by said bank and were then found to be correct in every respect, and that all moneys handled by him had been accounted for up to that time, and that he had performed his duties in an acceptable and satisfactory manner, and that said bank knew of no reason why the guaranty bond executed by this defendant should not be continued; but defendant says that, in fact, said statements, assertions, and certificates were, and each of them was, false and fraudulent, and known by said bank to be false and fraudulent, but the defendant did not know the same to be false or fraudulent, and, on the contrary, the defendant believed and relied on said statements and each of them, and but for said statements, assertions, and certificates, the defendant would not have renewed or continued said bond on June 1, 1895, or June 1, 1896, and the defendant would immediately have canceled and revoked said bond, as it had a right to do, and as the said bank knew it had a right to do. The said bank purposely withheld from the defendant the proper information as to the acts and conduct and accounts of said McKnight, and thus misled and deceived the defendant."

A reply was filed controverting the affirmative allegations of the answer, and the cause was tried to a jury. Various exceptions were taken by the defendant to the exclusion of offered evidence and to instructions to the jury. A verdict was returned for plaintiff, and from the judgment entered thereon an appeal was taken to the Circuit Court of Appeals for the Sixth Circuit. That court affirmed the judgment. (103 Fed. Rep. 599.)

A writ of certiorari was then allowed.

Mr. Justice WHITE, after making the foregoing statement, delivered the opinion of the Court.

We shall consider under separate headings the several propositions upon which reliance is placed to demonstrate that error was committed by the trial court.

1. The court erred in admitting in evidence a notice of the default of McKnight given to the surety company by the receiver on February 18, 1897, and in instructing the jury that the requirements in the bond, that immediate notice should be given of a default, was fulfilled by giving notice "as soon as reasonably practicable and with promptness" or "within a reasonable time."

The bank was closed by the Comptroller on January 18, 1897, and the receiver was appointed four days afterwards. The experts employed by the receiver to examine the books of the bank began to discover the defaults of McKnight "about two or three weeks after the bank was closed." The notice by the receiver to the surety company that McKnight was a defaulter was given on February 18, 1897. It follows that the notice was given within ten to seventeen days after the first discovery of a default. Both the trial court and the Circuit Court of Appeals, re-

viewing numerous authorities, held that the requirement in the bond "that the employer shall immediately give the company notice in writing of the discovery of any default or loss" ought not to receive the construction that it was intended by the parties that notice of a default should be given instantly on the discovery of a default, but that what was meant was that notice should be given within a reasonable time, having in view all the circumstances of the case. In so deciding we think the court did not err. Indeed, this construction of the word "immediate" would seem to be applied in practice, as is illustrated by the bond of indemnity considered in the case of the *Guarantee Co.* v. *Mechanics' &c. Co.*, (183 U. S. 402,) where one of the conditions was "that the company shall be notified in writing of any act on the part of said employee which may involve a loss for which the company is responsible hereunder to the employee *immediately or without unreasonable delay.*"

A quite recent case, decided by the Supreme Court of New Hampshire, (*Ward* v. *Maryland Casualty Co.*, 51 Atlantic Reporter, 900,) so lucidly states the true construction of the word immediate as employed in a bond cognate to the one under consideration, that we excerpt a passage from the opinion (p. 902):

"The defendants' liability depends in part upon the answer to the question whether the plaintiffs gave them 'immediate' notice in writing of O'Connell's accident, the claim made on account of it, and the suit that was brought to enforce the claim. This involves an ascertainment of the meaning of the word 'immediate' as used in the policy. The word, when relating to time, is defined in the Century Dictionary as follows: 'Without any time intervening: without any delay; present; instant; often used, like similar absolute expressions, with less strictness than the literal meaning requires,—as an immediate answer.' It is evident that the word was not used in this contract in its literal sense. It would generally be impossible to give notice in writing of a fact the instant it occurred. It cannot be presumed that the parties intended to introduce into the contract a provision that would render the contract nugatory. As 'immediate' was understood by them, it allowed the intervention of a period of time between the occurrence of the fact and the giving of notice more or less lengthy according to the circumstances. The object of the notice was one of the circumstances to be considered. It was to enable the defendants to take steps for their protection that must necessarily be taken soon after the occurrence of the fact of which notice was to be given, a briefer time would be required to render the notice immediate according to the understanding of the parties than would be required if the object could be equally well attained after considerable delay. For example, a delay of weeks in giving notice of the commencement of the employee's suit might not prejudice the defendants in preparing for a defense of the action, while a much shorter delay in giving notice of the accident might prevent them from ascertaining the truth about it. The parties intended by the language used that the notice in each case should be given so soon after the fact transpired that, in view of all the circumstances, it would be reasonably immediate. If a notice is given 'with due diligence under the circum-

stances of the case, and without unnecessary and unreasonable delay,' it will answer the requirements of the contract. (*Chamberlain* v. *Insurance Co.*, 55 N. H. 249, 265, 268; May, Ins. (1st ed.) § 462; Id. (14th ed.) § 1089; *Donahue* v. *Insurance Co.*, 56 Vt. 375; *Lockwood* v. *Assurance Co.*, 47 Conn. 553, 568.) Whether the notices were reasonably immediate,—like the kindred question of what is a reasonable time,—are questions of fact that must be determined in the superior court. (*Tyler* v. *Webster*, 43 N. H. 147, 151; *State* v. *Plaisted*, Id. 413; *Chamberlain* v. *Insurance Co.*, 55 N. H. 265; *Austin* v. *Rieker*, 61 N. H. 97; *Ela* v. *Ela*, 70 N. H. 163, 165; 46 Atl. 414.)"

We think the trial court was right in refusing to instruct, as a matter of law, that the notice was not given as soon as reasonably practicable under the circumstances of the case, or without unnecessary delay, and in leaving the jury to determine the question whether the receiver had acted with reasonable promptness in giving the notice.

2. The court erred in instructing the jury that the proof of claim sent to the surety company by the receiver on July 2, 1897, was made "as soon as practicable" after the giving of notice of the default of McKnight.

This objection is also without merit. The requirement of the bond was that the employer "shall file with the company his or her claim hereunder, with full particulars thereof, as soon as practicable" after the giving of written notice of a default or loss. What was required was not a partial, but a full statement of all the items of claimed misappropriations on which the right to recover upon the bond was based. The investigation to ascertain the various defaults of McKnight continued after the giving of the preliminary notice of default, and the evidence in the record fails to give any support to the contention that the proof of claim was unreasonably delayed, and was not made as soon as practicable after the full particulars thereof were ascertained.

3. The court erred in instructing the jury that the averments contained in the petition filed by the receiver in an action in attachment against McKnight, brought in a State court of Kentucky, on March 6, 1897, to recover various items of alleged indebtedness of McKnight to the bank, should be given no effect in their deliberations, as but one of said items was embraced in the present action.

The petition referred to was presumably introduced in evidence on behalf of the defendant, as tending to establish that the proof of claim was not made by the receiver as soon as practicable after the giving of notice that McKnight had been guilty of a default. While the trial judge did not state the reasons which led him to instruct the jury to disregard the statements in the petition, the reason for such action was manifest. The petition counted upon various items, a portion only of which were embraced in the petition in the action on trial, and the fact

that the petition in the attachment action showed that when filed the receiver knew of some of the misappropriations of McKnight, did not tend to prove that he then had knowledge of all of the defaults of McKnight.

4. The court erred in refusing to permit the defendant to read as evidence to the jury a letter of Edwin Warfield, president of the defendant, and dated May 15, 1896, and addressed to the German National Bank of Louisville, Kentucky, and also the reply of R. E. Reutlinger, the cashier of the said bank, written on May 29, 1896, addressed to the defendant, said letter having been an inquiry by the president of the defendant as to the renewal of the bond of McKnight, and the response being an assurance by the cashier of the bank that McKnight had up to that time performed his duties in an acceptable and satisfactory manner, and he, the cashier, knew of no reason why the bond should not be continued. These letters, it being contended, were erroneously excluded on the ground that it had not appeared from the evidence that there was special authority from the board of directors to the cashier to write the letter of response of May 29, 1896. Further, the court also, it is asserted, erroneously refused to allow the defendant to prove by circumstantial evidence that the board of directors selected the bondsman of McKnight and paid for the bond, and that the said cashier was acting in this matter with the knowledge and for the benefit and with the approval of the board of directors.

We are constrained to the conclusion that error was committed in rejecting the evidence referred to in the foregoing contention. It was competent for the defendant to show that the bank had concerned itself in and about the obtaining of the bond and renewals in such manner as to cause the transaction to become in effect the business of the bank. The bank had notice from the terms of the original bond that it was issued in reliance upon statements and representations made on its behalf to the surety company, and that, in the ordinary course, renewals, which were to be optional with the surety company, might also be based upon further statements to be made on behalf of the bank. Thus, in the original bond, it was recited that "The said employer has delivered to the company a certain statement, it being agreed and understood that such statement constitutes an essential part of the contract hereinafter expressed." It was a reasonable and proper precaution, in anticipation of a desired renewal, to propound the inquiries which were submitted by the surety company. The inquiry was contained in a written communication, addressed *to the bank*, it was received by the bank, and it was proper to presume that it was delivered to the official who made reply thereto, by authority of the bank, he being the executive officer who was charged with conducting the correspondence of the bank. We think the making of the certificate was an act done in the course of the business of the bank, by

an agent dealing with the surety company for and on behalf of the bank. It did not purport to be, nor was it designed to be, the mere personal representation of the individual who filled the office of cashier, but it was an official act, performed on behalf of the bank. The information solicited was such as was proper to be asked of and communicated by the bank, and as the renewal was presumably made upon the faith of the statements contained in the certificate, the bank ought not to be heard, while seeking to obtain the benefits of the stipulations agreed to be performed by the surety, to deny the authority of its officer to make the representations which induced the surety to again bind itself to be answerable for the faithful performance by McKnight of the duties of his employment. (*Railway Companies* v. *Keokuk Bridge Co.*, 131 U. S. 371.) In *Guarantee Co.* v. *Merchants' &c. Co.*, (183 U. S. 402,) this court recognized as binding upon the bank a certificate given by one of its officers embodying replies to questions asked by the guarantee company respecting one of the employees of the bank, although no proof was introduced that special authority had been conferred upon the officer to make the certificate. Nor does the ruling in *American Surety Company* v. *Pauly*, (170 U. S. 156,) warrant the claim that it is an authority against the admissibility of the certificate here in question. In the bond considered in the Pauly case, it was not agreed that the statement of the president, upon which the bond was obtained, should be the basis of the bond. The answers made by the person who was president of the bank to the interrogatories of the surety company were but mere commendations by one individual of another individual, at a time when, as said by the court, "no relations existed between the bank and the surety company." Again, in the Pauly case, no letter of inquiry was addressed to the bank, unlike the practice pursued with respect to the renewal here in controversy, and the letter, whose contents in the Pauly case was claimed to be binding on the bank, was written by one who was not charged with the duty of conducting the correspondence of the bank. As held in *Xenia Bank* v. *Stewart*, (114 U. S. 224.) a communication which on its face evidences that it was written by the cashier of a bank, should not be excluded from the jury as not being an act of the bank, where "it appears with reasonable certainty to have regard to the business of the bank." In the case at bar it is manifest these elements were present, and the exclusion of the certificate, as also of the evidence designed to establish that the giving of the certificate was an act done in the course of the business of the bank, was erroneous.

But the fact that error was committed in the particulars just stated does not necessarily lead to a reversal, since the settled doctrine is that even if error has been committed, yet if it appears clearly from the record that such error was not prejudical, the judgment cannot be disturbed. (*Origet* v. *Hedden*, 155 U. S. 228, 235; *Fidelity Association of Phila-*

delphia v. *Mettler, ante.*) In order to determine whether prejudice resulted from the rulings referred to, it becomes essential to state the facts as portrayed in the bill of exceptions.

McKnight was for a period of time vice president and subsequently the president of the German National Bank. Any and all claims which may have been asserted in the petition as to misconduct or default on the part of McKnight prior to the 1st of January 1896, were abandoned at the trial, and there is nothing in the record to support the contention that anything took place prior to that date which affected the truth of the statement made in the certificate given by the cashier on May 29, 1896. In January, 1896, McKnight was president and a director; Adolph Reutlinger was vice president and a director, and R. E. Reutlinger was cashier and teller of the bank.

On May 14, 1896, the mayor of the city of Louisville died. The vacancy occasioned was to be filled by the municipal council of the city, and McKnight became a candidate for the office. There was an active contest, and the incidents connected with the election became the subject of discussion in the public press and of consequent notoriety in the community. One Edmunds, who was a business partner of McKnight, was a prominent factor in said contest, as representing the interest of McKnight, and Edmunds frequently visited the bank and conferred with McKnight in respect to the contest. Edmunds, on his visits to the bank, "was often seen by and had conversations with the vice president and other directors of the bank, who knew the purpose of his visits." The firm of S. E. Edmunds & Co., composed of McKnight and Edmunds, had an account on the books of the bank. Edmunds, however, had no individual account with the bank.

On January 18, 1896, Edmunds came to the bank and there drew his personal check on the bank for the sum of $1,000. McKnight directed this check to be cashed, and, as Edmunds wished ten one hundred dollar bills for the check, McKnight, in the hearing of the vice president, told the cashier to take one thousand dollars and go to a neighboring bank and get the denomination of bills desired, which he did, and they were handed over to Edmunds. The check of Edmunds which had been thus cashed, although he had no individual account with the bank, was, by the direction of McKnight, carried by the cashier as a cash item until March 12 following. On the date last named, by the direction of McKnight, the amount was charged to the account of S. E. Edmunds & Co., it not appearing that the effect of this debit was to overdraw this latter account.

It was shown that at the time Edmunds drew this check there was an understanding between himself and McKnight that he, McKnight, should be responsible for the check and see that it was paid. The money which

Edmunds received it was proven was used by him in bribing four members of the city council to vote for McKnight for mayor, and in consideration of the payment, the parties, on receiving the money, signed the following agreement:

"I hereby pledge myself to vote for J. M. McKnight for mayor of the city of Louisville, first, last, and all the time, until elected or defeated before the general council."

There was no proof introduced to show that the officers or directors of the bank, other than McKnight, had any knowledge of the purpose for which the check was drawn or the use which was made of it, unless it be that the fact that they knew that McKnight was a candidate for mayor had a tendency to show that he was engaged in unlawful practices.

On January 21, 1896, to pay his own debt, McKnight drew his individual check (he having an individual account with the bank), for $1,253, to the order of a person to whom he was personally indebted. This check was paid. McKnight instructed the cashier not to have this check charged up but to carry it as cash, and it was so carried until March 12, 1896, when McKnight directed that the check be debited to the account of S. E. Edmunds & Co., which was done. Subsequently, and prior to the 12th of March, 1896, another check was drawn by McKnight, on his individual account, for $1,650, and was paid and carried by the cashier, by McKnight's direction, as cash, until March 12, 1896, when it was charged up to the Louisville Deposit Collateral account. This latter was an account on the books of the bank of which McKnight had the management and control as president of the bank, but in which he had no personal interest. It was shown that the carrying of these checks by the cashier in his cash as money was called to the attention of the vice president of the bank, who made inquiry on the subject as to why it was done and was informed that it was done at the request of McKnight, the latter presumably directing the checks to be charged as above stated, in consequence of such inquiry.

McKnight was defeated for mayor. It was matter of common knowledge in Louisville that there was great dissension between the elected mayor and members of the boards of aldermen and councilmen and that members of the board of aldermen were endeavoring to block legislation proposed by the new mayor. There was proof tending to show that McKnight fomented this discord, and drew up a paper, which was signed by five aldermen, pledging themselves to be controlled in the performance of their duties by McKnight. Two other signatures, however, were required to get control of the board. McKnight was informed by Edmunds that two aldermen were wavering, and that to obtain their signatures to the agreement it would be necessary to pay each of them $1,000. On February 6, 1896, McKnight requested the cashier to remain at the

bank and keep the vault open after the regular time for closing, and said to him that he "had a big scheme on hand, and that it was a big thing." The bank was kept open, and at about half-past six Edmunds brought to the bank the two aldermen in question. Thereupon, in the presence of these two men and the cashier, Edmunds prepared a note, which was then signed by the two aldermen, as follows:

"$2,000.00 Louisville, Ky., February 6, 1897.

"One year after date we promise to pay to the order of ourselves two thousand dollars without defalcation, value received, negotiable and payable at German National Bank."

After signing the note, the two aldermen went upstairs, later returned to the bank office, and then received from the cashier, who acted under the instructions of McKnight, the sum of $2,000 in currency.

It was shown that, while upstairs in the bank building, the two aldermen affixed their signatures to the following paper, which had already been signed by five other of the aldermen:

"Louisville, Ky., February 5th, 1896.

"We do this day and date agree with one another, and bind ourselves on our sacred words and honor, that we will stand together on any and all propositions of legislation that may come before the body of which we are members, namely, the board of aldermen of the city of Louisville; that we will so caucus with our friend J. M. McKnight, and act wisely, and secure for our friends an equal division of the offices and any profit that may arise therefrom; that we, as men and members of the upper board, will not allow the mayor to force upon us any appointments that we do not deem wise and to our interest, and in so doing will not act the first night of a meeting on any proposition sent in by the mayor, but will take one week for consideration and caucus.

"Now we have calmly considered the above, and do again pledge ourselves one to the other before subscribing our names this day and date, February 5th, 1896, in the presence of one and the other."

There was no testimony tending to show knowledge on the part of the bank, or any of its officers and directors, other than McKnight, of the purpose for which this $2,000 was paid, or of the relations which existed between McKnight and the men to whom it was paid, unless such knowledge was lawfully inferable from the circumstances above stated and those hereafter mentioned.

On the night of the occurrences above detailed the cashier of the bank went to the residence of his father, the vice president, and told him of the keeping open of the bank that evening and the cashing of the note. The next morning the vice president asked McKnight for an explanation of the matter, and the latter responded that the transaction was all right and that the note was good, and that it would be guaranteed by men of credit, whom he named. McKnight also said that he would guarantee

the payment of the note; that the parties were obliged to have the money that night, and he kept the bank open to let them have it. When this conversation was had McKnight had a long, yellow envelope in his hand, and he told the vice president that "he had a document there in his pocket which was signed by those fellows;" that "he had a meeting up stairs and that paper was signed, and he would not sign it for the city of Louisville;" but McKnight did not mention the names of the persons who had signed it. The vice president noticed that the bank was to get no interest on the loan. He informed other members of the board of directors, and shortly afterwards the matter was brought before the board for its consideration. The vice president reported to the board that he had made some investigation and could not find that two aldermen who had signed the note had any property, and he was unable to say whether or not they were good. McKnight made the same statement to the board that he had made to the vice president, though to neither the vice president nor the bank was any explanation made about the interest feature of the transaction. He assured the directors that the note was good. This explanation satisfied the board, and they passed the note. One Jacob Reisch, a director at the time, testified on the witness stand, however, that some short time after the execution of this note the vice president told him what he had learned about the matter, and said to him that the money was used in the mayor's race. This latter statement the vice president denied having made. We quote from the bill of exceptions the following statement:

"There was also evidence tending to show that J. M. McKnight was president of the bank, and the other officers of the bank, including the directory, had entire confidence in his honesty and integrity up to the time the bank was closed; that none of them had any knowledge that any act of his, in the management of said bank, was fraudulent or dishonest, until after the closing of the bank; that said bank had a discount committee who regularly examined and passed on the papers of the bank, as required of such committee, and the directory of said bank undertook to make a monthly investigation, sometimes twice a month, of the affairs of said bank, and required the president to go through same with them and make a full report thereon; that some of the directors were in the bank almost daily inspecting its affairs, and that they did at all times observe due and customary supervision over said president for the prevention of default; that none of the officers of said bank, including the directory, had any knowledge of the various checks set up in the petition as fraudulent, and that were charged to the account of other parties than those drawing them, or on whom they were drawn, except the clerks who charged them up to said account as stated, and there was evidence tending to show that they charged them up to such accounts by the direction of McKnight, the president, and except, further, R. E. Reutlinger, the cashier and teller of said bank, knew of said checks when they came into said bank and was instructed to hold them as cash items by McKnight, but further than this he had no knowledge of them."

Now, with this state of the record in mind, we come to consider the statements in the certificate signed by the cashier, on May 29, 1896, in answer to the letter of the surety company, shortly before the bond was renewed, to determine whether prejudicial error arose from rejecting the certificate. The certificate stated that the president "has performed his duties in an acceptable and satisfactory manner, and we know of no reason why the guarantee bond should not be continued." There was certainly proof showing that the action of the president as to the three checks, and the charging them to accounts on the books of the bank, deceived the officers of the bank and caused them to be satisfied with the transactions. Certainly also there was uncontradicted evidence establishing that the explanation given by McKnight of the discount of the two thousand dollar note satisfied the directors. There was no justification in the evidence on these subjects to take the case from the jury and instruct a verdict for the defendant upon the theory that in and of themselves the transactions were of such a character as to preclude the possibility of a belief in the sufficiency of the explanation made by the president, however apparently reasonable those explanations may have been and however honest may have been the belief in their truth. This being so, it follows that the only basis upon which it could have been found that the bank was dissatisfied was the deduction from the facts and circumstances that the bank knew of the fraud which the transactions were intended to effectuate. And this latter view was stated by the court to the jury. Referring to the alleged fradulent checks and drafts of the president, the court said:

"The mere fact of drawing for more than you have got in the bank without any fradulent intent in that mere transaction would hardly be a fradulent act within the meaning of this bond.

"Now, I suppose in this case, if the bank had known that McKnight was making these drafts for these various fraudulent purposes, such as buying up councilmen, buying up aldermen, paying his own private personal debts; if the bank had known that and consented to it, there would not have been a fraudulent act of McKnight for which the bank could recover against this company.

"But if you believe from the evidence that the bank did not know of the fraudulent purposes for which these overdrafts were made, if the overdrafts were made in connection with this matter—if you believe the bank did not know the fraudulent purposes, then that changes the result; because if the bank did not know it and still consented to it, it would not relieve the act of McKnight from the character of being a fraudulent act. So that, as I view this case—you must remember, however, that you are the sole judges of the evidence in this case, its credibility—as I view this case, however, there would be no fraudulent acts upon McKnight's part, limiting my observations now to the overdrafts, there would be no fraudulent acts upon his part merely in an overdraft, if there were no fraudulent intent behind it which was concealed from the bank."

Again, the court—referring to the [redacted] transaction—said:

"If you believe from the evidence that the bank did know of this fraudulent purpose, and that this default of McKnight's, this fraudulent act of McKnight's, in getting these two thousand dollars, was known to the bank at the time, then I instruct you that all of the liability of the defendant in this case would cease then, that being the earliest, or one of the earliest, if not the earliest, of all these transactions. If you believe from the evidence that this transaction was known and condoned by the bank at the time, before these other transactions occurred, then the defendant in this case is not liable."

In other words, reiterating in a somewhat different form the proposition previously stated if the certificate transmitted by the cashier to the surety company had been received in evidence it would not alone have availed as a defense, because further proof would have been required showing the falsity of the statements contained in the certificate. In view, however, of the uncontradicted testimony tending to show that in the course of the transactions relied upon the president had, either by conduct or explanation, produced the impression on the bank that the transactions were *bona fide*, and therefore relieved the bank from any dissatisfaction as to the transactions, it must follow that the falsity of the certificate could alone have been inferred by concluding either that the transactions in and of themselves were of such a character that as a matter of law no explanations made of them by the president could have justified the bank in being satisfied on the subject, or that the surrounding circumstances were such as to authorize the jury to infer that the bank must have known of the fraud, and therefore to find that the bank could not possibly have been satisfied with the conduct of the president. But the first hypothesis, we have pointed out, was inadmissible. The second was left to the jury to determine, since the charge of the court was that if the jury could deduce from the proof knowledge on the part of the bank of the fraud of the president, the surety company would not be liable on the bond. As, therefore, the very question which the jury would have been called upon to determine if the certificate had been received in evidence was fully submitted to them and was necessarily negatived by their verdict, no foundation exists for holding that prejudicial error resulted from excluding the certificate.

5. The trial court erred in not instructing the jury that the knowledge possessed by an officer or director of the bank, of the fraudulent purposes of McKnight, though such knowledge had not been communicated to the bank, should be treated as the knowledge of the bank; and also erred in not instructing the jury that the knowledge which any officer or director of the bank might have acquired of the fraudulent conduct of McKnight, if such officer or director had exercised customary supervision, should be imputed to the bank.

The questions which these propositions enbrace were raised by the exceptions taken to certain portions of the charge to the jury, referred to in the record as instructions Nos. 5, 6 and 7. In instruction No. 5 the court told the jury, in general terms, that the bank, under the stipulations contained in the bond, owed to the surety the duty of exercising due and customary supervision over McKnight to prevent the commission by him of fraudulent acts, and further instructed that if the bank knew of the fraudulent purposes of McKnight in connection with the drafts and checks upon which recovery was sought, the surety would not be liable. Exception was taken to this instruction, on the ground that it "did not submit correctly to the jury consideration of knowledge on the part of the officers or directors of the bank other than McKnight, which they had, or would have had, if customary supervision had been exercised." Instruction No. 6, and the objection made to it, reads as follows:

"I do not think that the knowledge of a cashier of a bank, speaking generally, is the knowlege of the bank as to any matter that does not come within the customary or ordinary duties of a cashier or those which have been specially imposed upon him by the action of the bank. I do not think Mr. R. E. Reutlinger, in this case, in respect to any matter which he knew or could do, represented the bank, if it was outside of his ordinary duties; and I do not recall anything that he knew, so far as the proof shows that would in anywise affect the liability of the defendant in this case."

Objection was made to the foregoing portion of the charge, on the ground that the knowledge of the cashier of the acts of McKnight in respect to his overdrafts, his transactions in connection with the $2,000 note signed by the two aldermen and with the checks to Edmunds, and the several checks for McKnight's individual account, was the knowledge of the bank, and that the jury should have been so told.

Instruction No. 7 dealt with the $2,000 note transaction. In effect, the jury were instructed that the knowledge of the cashier acquired in the performance of his duties might be imputed to the bank, but that the vice president or an individual director did not hold such an official relation to the bank as that his knowledge of wrongdoing by McKnight, if not communicated to the bank, could be treated as the knowledge of the bank.

We do not deem it necessary to analyze the instructions given by the court for the purpose of determining whether they were in all respects accurate, because we are of the opinion that if the court in anywise erred it was in giving instructions which were more favorable to the defendant surety than was justified by the principles of law applicable to the case.

It is well settled that, in the absence of express agreement, the surety on a bond given to a corporation, conditioned for the faithful performance by an employee of his duties, is not relieved from liability for a loss within the condition of the bond by reason of the laches or neglect of the

board of directors, not amounting to fraud or bad faith, and that the acts of ordinary agents or employees of the indemnified corporation, conniving at or co-operating with the wrongful act of the bonded employee, will not be imputed to the corporation. *United States* v. *Kirkpatrick*, (1824) 9 Wheat. 720, 736; *Minor* v. *Mechanics' Bank*, (1828) 1 Pet. 46; *Taylor* v. *Bank of Kentucky*, (1829) 2 J. J. Marshall (Ky.) 564; *Amherst Bank* v. *Root*, (1841) 2 Metcalf, 522; *Louisiana State Bank* v. *Ledoux*, (1848) 3 La. An. 674; *Pittsburg, Fort Wayne & Chicago Ry. Co.* v. *Shaeffer*, (1868) 59 Penn. St. 350, 356; *Atlas Bank* v. *Brownell*, (1869) 9 Rhode Island, 168. The doctrine of these cases is thus epitomized in 59 Penn. St. 357:

"Corporations can act only by officers and agents. They do not guaranty to the sureties of one officer the fidelity of the others. The rules and regulations which they may establish in regard to periodical returns and payments are for their own security, and not for the benefit of the sureties. The sureties, by executing the bond, became responsible for the fidelity of their principal. It is no collateral engagement into which they enter, dependent on some contingency or condition different from the engagement of their principal. They become joint obligors with him in the same bond, and with the same condition underwritten. The fact that there were other unfaithful officers and agents of the corporation, who knew and connived at his infidelity, ought not in reason, and does not in law or equity, relieve them from their responsibility for him. They undertake that he shall be honest, though all around him are rogues. Were the rule different, by a conspiracy between the officers of a bank or other moneyed institution, all their sureties might be discharged. It is impossible that a doctrine leading to such consequences can be sound. In a suit by a bank against a surety on the cashier's bond, a plea that the cashier's defalcation was known to and connived at by the officers of the bank, was held to be no defense. (*Taylor* v. *Bank of Kentucky*, 2 J. J. Marsh, 564.)"

So, also, in 3 La. An. 674, the court, after suggesting the distinction between the knowledge of the governing body of a bank, the board of directors, of the default of a bonded employee, and the knowledge of such default by another officer or employee, not communicated to the board, thus tersely stated the applicable doctrine (p. 684):

"It cannot be said that if one servant of a bank neglects his duty, and by his carelessness permits another servant of the bank to commit a fraud, the surety of the fraudulent servant shall be thereby discharged."

And see *American Surety Co.* v. *Pauly*, (170 U. S. 156, 157,) and cases cited. In other words, the principle of law discussed in the case of *The Distilled Spirits*, (11 Wall. 356,) viz., that the knowledge of an agent is in law the knowledge of his principal, is intended for the protection of the other party (actually or constructively) to a transaction for and on account of the principal had with such agent. In the very nature of things, such a principle does not obtain in favor of a surety who has

bonded one officer of a corporation, so as to relieve him from the obligations of his bond, by imputing to the corporation knowledge acquired by another employee subsequent to the execution of the bond, (and from negligence or wrongful motives, not disclosed to the corporation,) of a wrong committed by the official whose faithful performance of duty was guaranteed by the bond. As the rule of imputation to the principal of the knowledge of an agent does not apply to such a case, it must follow that it can only obtain as a consequence of an express provision of the contract of suretyship. Was there such a provision in the bond now under consideration?

Now the clause of the bond sued on, and as to which the court was instructing the jury in the portions of the charge under consideration, is as follows:

"'That the employer shall observe, or cause to be observed, due and customary supervision over the employee for the prevention of default, and if the employer shall at any time during the currency of this bond condone any act or default upon the part of the employee which would give the employer the right to claim hereunder, and shall continue the employee in his service without written notice to the company, the company shall not be responsible hereunder for any default of the employee which may occur subsequent to such act or default so condoned.'"

Manifestly, this stipulation is not fairly subject to the construction that it was the intention that the neglect or omission of a minority in number of the board of directors or the neglect or omission of subordinate officers or agents of the bank should be treated as the neglect or omission of the bank. The provision is not that a minority in number of the board of directors or that subordinate officers or agents would exercise due and customary supervision, and would not condone a default of the bonded employee or retain him in his employment after the commission of a default, but the agreement is that the bank would do or not do these things. This in reason imports that the things forbidden to be done or agreed to be done were to be either done or left undone by the bank in its corporate capacity, speaking and acting through the representative agents empowered by the charter to do or not to do the things pointed out. To hold to the contrary would imply that the bond forbade the doing of an act by a person who had not power to perform or commanded performance by one who could not perform. Assuredly, therefore, the conditions embodied in the stipulation to which we have referred, both as to doing and non-doing, contemplated in the reason of things the execution of the duties which the contract imposed on the bank, either by the governing body of the bank, its board of directors, or by a superior officer, such as the president of the bank, having a general power of supervision over the business of the corporation, and vested with the authority to condone the wrongdoing or to discharge a faithless employee. That is to say, the

stipulation in all its aspects undoubtedly related to the bank, acting through its board of directors or through an official who, from the nature of his duties, was in effect the vice principal of the bank. The decision in *Guarantee Co.* v. *Mechanics' &c. Co.*, (183 U. S. 402,) it may be remarked, in passing, is not antagonistic to the views we have just expressed, because in that case all the information which was held imputable to the bank had been communicated to the president of the bank.

Now, applying the principles previously expounded to the case in hand, it is evident that the court rightly refused to instruct the jury that the mere knowledge of one or more directors, less than a majority of the board, and of the vice president of the bank, of the default of the president, was imputable to the bank. Indeed, as we have previously said, when the charge which the court gave is considered, it is apparent that the court went quite as far as the law warranted, in favor of the defendant, since the court instructed that knowledge acquired by the cashier in the course of the business of the bank, and not communicated by him to the board of directors, should be regarded as the knowledge of the bank.

6. The Court of Appeals erred in affirming the action of the trial court in instructing the jury that the carelessness of the directors in the management of the bank was not an issue for them to consider.

In considering the clause of the charge to the jury which provided that "due and customary supervision over the employee" should be observed "for the prevention of default," the trial court told the jury that it imported "a reasonable vigilance upon the part of the bank to prevent defaults," that is, to prevent the commission of fraudulent acts by McKnight. To instruct the jury in broad terms that if they found that the directors were careless in the management of the bank generally they should find for the defendant, could only have served to mislead. The court did not err in refusing the requested instruction.

Judgment affirmed.

Mr. Justice GRAY and Mr. Justice BREWER did not hear the argument and took no part in the decision of this cause.

True copy.

Test:

Clerk Supreme Court, U. S.